STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Annetta Chisholm,
Petitioner,

vs.

NO: 09WC 16027

Illinois State Toll Highway Authority,
Respondent,

14IWCC0141

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 8, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: FEB 2 7 2014
o022014
CJD/jrc

049

Charles J. DeVriendt

Stephen Mathis

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHRISHOLM, ANNETTA
Employee/Petitioner

Case# **09WC016027**

09WC016028

10WC006494

IL STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

14IWCC0141

On 2/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2333 WOODRUFF JOHNSON & PALERMO
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0210 GANAN & SHAPIRO PC
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CHICAGO, IL 60654

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1024 IL STATE TOLL HIGHWAY AUTHRITY
WORKERS COMPENSATION CLAIMS
1 AUTHORITY DRIVE*
DOWNERS GROVE, IL 60515

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

FEB 8 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0141

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Annetta Chisholm
Employee/Petitioner

v.

Illinois State Toll Highway Authority
Employer/Respondent

Case # **09WC 16027**

Consolidated cases: **09 WC 16028 & 10 WC 06494**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson** , Arbitrator of the Commission, in the city of **Wheaton**, on **December 10, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **3/29/2009**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**37,093.16**; the average weekly wage was $**713.33**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **1** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Having found Petitioner failed to prove accident injuries arising out of and in the course and scope of her employment, the Arbitrator denies compensation.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

02-08-13
Date

FEB - 8 2013

STATEMENT OF FACTS

Petitioner began working for Respondent in April of 2007. She was originally assigned to Plaza #9, which was near Elgin. In either October or November of 2007, Petitioner testified she was assigned to Plaza #73, which was near Army Trail Road on I-355. At both locations, Petitioner worked as a toll collector, taking toll money from cars and trucks passing through the plaza.

Petitioner described the toll booth as "small" with glass windows on all sides. Petitioner testified some of the semi-trucks stopped with their air break, causing "smoke" to come out of the top of the truck. Petitioner testified the temperature within the booth fluctuated from 70 degrees to 90 degrees. When it was hot outside, she then opened the back door to the toll booth to allow in cooler air. She found the heat and summer brought more cars, trucks and RV's which in turn caused her breathing to be more "intense" and for her to experience more asthma attacks.

At times, Petitioner worked a "relief shift," which meant she went from booth to booth at the toll plaza in order to break the other toll collectors. When working a relief shift, Petitioner estimated she moved three to eight times in a shift. As all the booths were not on the same side of the highway, Petitioner at times walked an overhead or underground tunnel in order to reach the assigned booth. Petitioner testified she carried her tray, change bag, paperwork and water bottle to each booth. She estimated everything weighed 10 to 25 lbs. Each time she moved to a new booth, Petitioner estimated she walked between 500 and 1500 feet.

Petitioner primarily worked the 2nd and 3rd shifts, which covered the evening rush hour and the overnight hours. Petitioner acknowledged, after the evening rush, the traffic volume on the 2nd and 3rd shifts lessened. From October 13, 2007 through September 11, 2009, Petitioner usually worked between 6 and 8 hours a day. (Resp't Ex. No. 6 & 7) Petitioner worked 11 or more hours on only 20 days during the same period. (Id.)

The walkway at Plaza #9 went over the roadway. The distance of the walkway, end-to-end, was 286 feet. The distance from the main/annex office to each toll booth varied from 44 feet to 133 feet. The plaza had an elevator. Petitioner described the plaza and the booths as "newer" with a new ventilation system.

The walkway at Plaza #73 was an underground tunnel. The distance of the walkway, end-to-end, was 353 feet. The plaza did not have an elevator. At each end of the tunnel, there were 20 steps. The distance from the main/annex office to each toll booth varied from 57 feet to 124 feet. Petitioner testified there was no ventilation system in the tunnel, and she described a "moldy" smell in the tunnel. She acknowledged, though, she had no evidence mold was present in the tunnel. Petitioner described water leaking from what was previously a money vault with

puddles present in the tunnel. Petitioner estimated she walked through the tunnel three to eight times each shift.

Petitioner testified in January of 2009 she was diagnosed with asthma. Petitioner admitted she moved to a new home in January of 2009 as well. Petitioner also admitted her brother also had asthma.

Petitioner testified on March 29, 2009, a semi-truck came through the lane of her assigned toll booth, deployed its air break and black smoke appeared, which she then breathed in and became to cough. Petitioner testified she experienced chest pain, tried to work through it, but remained "barely able to breathe." She therefore sought medical attention.

At Alexian Brothers Medical Center on March 29, 2009, Petitioner was treated for an asthma attack, which reportedly began while she was working in a toll booth. Petitioner reported an increased cough and some chest tightness. The emergency room chart does not make mention of Petitioner breathing in fumes from a semi-truck after the air break was applied. Her past medical history was noted to be positive for asthma and hypertension.

On April 7, 2009, Petitioner presented to Dr. Jacqueline Moran at the Asthma & Allergy Center of DuPage Medical Group. Dr. Moran noted the diagnosis of asthma in January of 2009 with symptoms of shortness of breath, coughing and wheezing. Petitioner was then taking Advair, Asmanex 220 mg 1 puff daily and albuterol. The main triggers, as reported by Petitioner, were cleaners and walking. When describing the events of March 29, 2009, Petitioner did not mention breathing in fumes from a semi-truck. Instead, she reported walking through an underground tunnel with "water and mold damage." She reported by the time she reached her toll booth, she was coughing and felt like she "was sucking air through a straw." On examination, Dr. Moran noted Petitioner was morbidly obese and nasal turbinates 2+ bilaterally without discolored nasal drainage. Petitioner tested positive for allergins to trees, rag week, outdoor mod, cat and feather. Dr. Moran diagnosed allergic rhinitis and Dyspnea restriction with a positive bronchodilatory effect. She noted Petitioner's symptoms were out of proportion to the exam and spirometry. Petitioner's medications were adjusted and evaluation with a pulmonologist was recommended.

The pulmonologist, Dr. Villanueva, examined Petitioner on April 13, 2009. Petitioner now reported she changed toll plazas about seven months earlier due to unusual smells triggering her asthma.[1] Petitioner reported with the change she now walks through a damp tunnel. She reported symptoms of wheezing with asthma attacks, wheezing at night with coughing, snoring and chest tightness at night. The diagnosis remained Dyspnea and cough, asthma and fatigue,

[1] The Arbitrator notes this contradicts the testimony Petitioner provided for case numbers 09 WC 10628 and 10 WC 06494. In her testimony for the two cases, Petitioner testified she transferred from toll plaza #9 to toll plaza #79 in either October of November of 2007.

with snoring. Petitioner underwent a polysomonographic test on April 25, 2009, which demonstrated obstructive sleep apnea hypopnei syndrome. The test was obtained in response to Petitioner's complaints of loud and disruptive snoring, as well as fatigue.

Petitioner remained under Dr. Nelson's care for asthma. In a note dated May 27, 2009, Dr. Nelson indicated Petitioner's asthma had been well controlled until January of 2009 when she transferred to a new toll plaza and was required to walk underground. Dr. Nelson recommended Petitioner not be exposed to the tunnel, not walk more than 50 feet when carrying more than 25 lbs and limit her exposure to extreme temperatures to less than one continuous hour.

On May 20, 2009, Petitioner presented herself once again to the emergency room at Alexian Brothers Medical Center for shortness of breath and asthma. She now reported the symptoms began while she was at work and that she "works in a tunnel with auto fumes." Petitioner also reported she had problems with her asthma for the last 2 to 3 days and having run out of the albuterol the prior day. A nebulizer treatment was administered, and Petitioner was then discharged home.

Petitioner described an incident with her supervisor on May 29, 2009, which she testified was a disagreement over the nature of her work and her condition. Petitioner was later transported from home by ambulance to the emergency room at Alexian Brothers Medical Center where she reported a worsening of her asthma symptoms are arguing with her supervisor. The physician indicated Petitioner's symptoms were exacerbated by exposure to allergens (not identified in the records) and emotional stress. Petitioner was treated and released.

Petitioner underwent a second polysomnographic test on June 27, 2009, which demonstrated findings similar to the study obtained in April. The study, though, was limited by a lack of supine REM sleep. CPAP therapy was recommended. In the meantime, Petitioner was off work due to a condition of bilateral plantar fasciitis.

On August 2, 2009, Petitioner was again transported to the emergency room of Alexian Brothers Medical Center for reported problems with asthma due to fumes. Petitioner reported having difficulty breathing with tightness in her chest. Use of her inhaler only provided mild relief. Petitioner also reported the symptoms began the prior day. She was again treated for asthma related symptoms and released.

Petitioner testified she last sought treatment for her asthma on August 29, 2009 with Dr. Nelson. In a note dated August 11, 2009, Dr. Nelson stated Petitioner experienced significant exacerbations of her asthma since December of 2008 which caused impairment of her work place. She indicate, as Petitioner worked as a toll booth operator, she was exposed to extremes

of temperature, allergens and vehicular exhaust. Dr. Nelson therefore opined Petitioner was disabled from continued work as a toll booth operator.

An Ambient Air Screening assessment was conducted at Plaza 73 of the Tollway over a 24-hour period on February 2 and 3, 2010. The study was conducted by Gerry Trzupek, an environmental scientist. Trzupek testified the screening was conducted in order to assess the air quality at the toll plaza and determine whether more extensive testing was necessary. The screening was done with the use of three monitors: (1) the Testo 350XL; (2) the Foxboro TVA 1000B; and (3) the Met One E-Sampler. Monitoring was done on the northbound side of the road at the 2nd toll booth, as this was determined to be the booth with the heaviest concentration of traffic. Monitoring was also done in the underground tunnel. Trzupek testified the monitoring was done continuously, with monitoring being interrupted for just a few moments on one of the monitors in order to replace the hydrogen flame.

Trzupek testified two related standards/guidelines were utilized for comparison purposes. The two related standards were the National Ambient Air Quality Standard and the Illinois Department of Public Health Guidelines for Indoor Air Quality. For the toll booth, Trzupek testified the findings and results were within acceptable limits and the findings did not indicate a need for further investigation, testing or study. For the tunnel, Trzupek testified the findings and results were within acceptable limits and the findings did not indicate a need for further investigation, testing or study.

Dr. Jeffrey Coe of Occupational Medicine Associates of Chicago, Ltd. reviewed Petitioner's medical history/records, the findings of the Ambient Air Screening conducted at Plaza 73 on February 2-3, 2010 and the MSDS for the various cleaning products used by the Tollway. When reviewing the results of the Air Screening study, Dr. Coe noted the findings were within standard guidelines with no evidence of significant carbon monoxide exposure and limited to minimal exposure to volatile organic compounds. Regarding the cleaning products used by the Tollway, Dr. Coe noted the cleaning products were solvents with mild irritant properties, but that no allergens were contained in any of the compounds used in the work place.

There are two types of asthma – intrinsic and extrinsic. Dr. Coe opined Petitioner had intrinsic asthma, which is an airway hypersensitivity of no specific or known underling cause that often has a genetic predisposition. He noted an individual with intrinsic asthma is at risk for exacerbation or acute attacks with inhalational exposure to various substances, but the exacerbations are temporary and do not cause a permanent structural change in the lung or a permanent worsening of the asthma. In Petitioner's case, Dr. Coe noted Petitioner had a clear history of a slow onset of her symptoms, a family history of asthma and a lack of exposure to recognized allergens in her work place. In addition, Petitioner suffered from other medical conditions which impeded her respiratory function, including obesity, obstructive sleep apnea and chronic allergic rhinitis.

Dr. Coe therefore opined Petitioner's condition of asthma was not work-related, as there was no evidence from the sampling of the Ambient Air Screening and the MSDS that Petitioner was exposed to pulmonary irritants in the work place. Even if one presumed Petitioner was exposed to pulmonary irritants in the work place, Dr. Coe opined such exposure would only "exacerbate" Petitioner's condition in the sense she would experience asthma symptoms without permanently altering the structure of her lungs or worsening her asthmatic condition on a permanent basis. As exposure to such allergens can cause symptoms of asthma to manifest, the condition itself necessitated Petitioner avoid exposure to the allergens whether in the work place or outside the work place.

In support of the Arbitrator's Decision relating to C, did an accident occur that arose out of and in the course and scope of Petitioner's employment by Respondent, the Arbitrator finds the following:

It is Petitioner's burden to prove by a preponderance of the credible evidence all elements of her claim, including whether the accident arose out of and in the course and scope of her employment. *See*, Hannibal v. Industrial Commission, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). In the instance case, Petitioner failed to prove her condition of asthma was caused, aggravated or accelerated by the environmental conditions of her work place. The Arbitrator also finds Petitioner's testimony regarding the onset of her asthmatic episodes is not credible or consistent with what she reported to the medical providers when seeking treatment in 2009.

First, Petitioner testified the asthmatic symptoms she experienced on March 29, 2009 occurred after a semi-truck passed through her booth's lane, releasing its air brake and causing her to inhale the "dark smoke" the truck released. The only time such a history was provided by Petitioner was when she testified at the hearing. The emergency room records from March 29, 2009 do not specifically indicate what brought on Petitioner's symptoms, as the chart only notes she was working in a toll booth when the symptoms began. However, when she presented to Dr. Moran for evaluation on April 7, 2009, Petitioner indicated the symptoms on March 29, 2009 began when she was walking through an underground tunnel on March 29, 2009 and was exposed to "water and mold damage." Dr. Moran indicated the triggers for Petitioner were walking and exposure to cleaners. There was no mention of exhaust fumes or black smoke from a truck triggering Petitioner' asthmatic symptoms, making her trial testimony not credible and inconsistent with the history she provided when seeking medical treatment.

Second, Petitioner offered to no evidence of exposure in the work place to allergens or pulmonary irritants, which is necessary in order for her to meet her burden of proof. The evidence offered by Respondent, in contrast, including the findings of the Ambient Air Screening study and the MSDS sheets indicate the absence of pulmonary irritants and allergens at any significant level or at a level in excess of national and state standards. As noted by Dr. Coe, Petitioner suffered from intrinsic asthma, which is asthma of an unknown etiology with likely genetic predisposition. The condition was diagnosed in January of 2009. Petitioner admitted she moved into a new home at about the same tie the condition was diagnosed and she began to experience the symptoms. Petitioner also suggested to Dr. Nelson the onset of symptoms coincided with her move from Plaza number 9 to Plaza number 73; however, Petitioner testified she changed toll plazas in either October or November of 2007, not in January of 2009.

Finally, the Arbitrator finds the opinions of Dr. Coe more credible than the opinion of Dr. Nelson. When determining whether Petitioner's asthmatic condition was caused, aggravated or accelerated by a work-place exposure to allergens, Dr. Coe relied on the various histories

Petitioner described to her treating physicians, the findings of the Ambient Air Screening study and the MSDS information for the cleaning products utilized by Respondent. It is clear, in contrast, that Dr. Nelson did not review any of the environmental information when formulating her opinion. Moreover, the Arbitrator notes Dr. Nelson never actually opined there was a causal connection between Petitioner's asthmatic condition and a work place exposure to environmental allergens. Dr. Nelson relied only on the information provided to her by Petitioner, which as noted previously was inconstant with her trial testimony and is thus not credible.

Consequently, Dr. Coe's opinion Petitioner suffered from intrinsic asthma of no known etiology is more credible. While Petitioner may have experienced symptoms of asthma while at work, as a result of walking, from the smell of cleaners (or even truck fumes) or from stress (the alleged incident that sent her to the emergency room on May 29, 29), all she experienced was a manifestation of symptoms associated with asthma which incidentally occurred while she was at work. The work place conditions did not cause or otherwise alter the structure of Petitioner's lungs or permanently aggravate her condition of asthma. Petitioner must prove more than the symptoms occurred while she was at work; she must prove the condition was caused, aggravated or accelerated by the conditions of the work environment. With no evidence of exposure to pulmonary allergens at anything other than minimal levels and at levels within accepted national/state standards, Petitioner failed to prove a work related cause for her asthma.

Based on the foregoing, the Arbitrator finds Petitioner failed to prove she sustained accidental injuries arising out of and in the course and scope of her employment by Respondent. Having found Petitioner failed to meet her burden of proof, Petitioner's claim for compensation is denied. The Arbitrator need not address the remaining issues.

STATE OF ILLINOIS)	☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF DUPAGE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Annetta Chisholm,
Petitioner,

vs. NO: 09WC 16028

Illinois State Toll Highway Authority,
Respondent,

14IWCC0142

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 8, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: FEB 2 7 2014
o022014
CJD/jrc

049

Charles J. DeVriendt

Stephen Mathis

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHRISHOLM, ANNETTA
Employee/Petitioner

Case# **09WC016028**

09WC016027
10WC006494

IL STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

14IWCC0142

On 2/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

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1024 IL STATE TOLL HIGHWAY AUTHRITY
WORKERS COMPENSATION CLAIMS
1 AUTHORITY DRIVE*
DOWNERS GROVE, IL 60515

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 8 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0142

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Annetta Chisholm
Employee/Petitioner

Case # **09WC 16028**

v.

Consolidated cases: **09 WC 16027 & 10 WC 06494**

Illinois State Toll Highway Authority
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson** , Arbitrator of the Commission, in the city of **Wheaton**, on **December 10, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **10/12/2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**37,093.16**; the average weekly wage was $**713.33**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $ for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Petitioner and Respondent agreed Petitioner was off work from October 13, 2007 through October 15, 2007, a period of three days. Pursuant to Section 8(b), Petitioner is not entitled to compensation for lost time benefits, as the period of disability did not last longer than the three day waiting period.

The Arbitrator finds Petitioner is entitled to receive and Respondent shall pay permanent partial disability of 2.05 weeks at $427.99/week to represent 1% loss of use of the left foot pursuant to Section 8(e)(11).

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

02-08-13
Date

FEB - 8 2013

STATEMENT OF FACTS

Petitioner began working for Respondent in April of 2007. She was originally assigned to Plaza #9, which was near Elgin. In either October or November of 2007, Petitioner testified she was assigned to Plaza #73, which was near Army Trail Road on I-355. At both locations, Petitioner worked as a toll collector, taking toll money from cars and trucks passing through the plaza.

Petitioner described the toll booth as "small" with glass windows on all sides. She testified the floor was made of cement with rubber mats sometimes provided. She testified some toll booths contained multiple rubber mats while other toll booths contained no rubber mat at all. A stool was provided, which Petitioner testified was only to be used during times of low traffic volume. Petitioner estimated she stood for four to seven hours of each shift she worked.

At times, Petitioner worked a "relief shift," which meant she went from booth to booth at the toll plaza in order to break the other toll collectors. When working a relief shift, Petitioner estimated she moved three to eight times in a shift. As all the booths were not on the same side of the highway, Petitioner at times walked an overhead or underground tunnel in order to reach the assigned booth. Petitioner testified she carried her tray, change bag, paperwork and water bottle to each booth. She estimated everything weighed 10 to 25 lbs. Each time she moved to a new booth, Petitioner estimated she walked between 500 and 1500 feet. During her shift, Petitioner wore gym shoes, which she purchased. She acknowledged a particular type of footwear was not mandated by Respondent.

Petitioner primarily worked the 2nd and 3rd shifts, which covered the evening rush hour and the overnight hours. Petitioner acknowledged, after the evening rush, the traffic volume on the 2nd and 3rd shifts lessened. From October 13, 2007 through September 11, 2009, Petitioner usually worked between 6 and 8 hours a day. (Resp't Ex. No. 6 & 7) Petitioner worked 11 or more hours on only 20 days during the same period. (Id.)

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collectors sat throughout the majority of their shift. Doyle observed Petitioner on multiple occasions working as a toll collector. Doyle testified each time he observed Petitioner she was sitting, not standing, in the booth.

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Petitioner did not seek any additional care for her left foot or ankle until December 14, 2007 when she presented to her family physician, Dr. Sara Nelson, at DuPage Medical Group for a regular physical examination.[1] During the physical, Petitioner reported complaints of increased pain in the bilateral heels with the right greater than the left. She recently discovered she had heel spurs, but had not had an opportunity to be evaluated by podiatry. She requested an injection to the heel, which was administered on the right. The diagnosis was a calcaneal spur.

Dr. Christina Brown, a podiatrist with DuPage Medical Group, examined Petitioner for the first time on December 19, 2007. Petitioner now reported having bilateral heel pain for approximately six months with the symptoms being worse in the right foot. She reported she spent approximately 45 hours each week on her feet. Dr. Brown diagnosed plantar fasciitis, tenosynovitis of the foot and ankle and a congenital valgus foot deformity. Dr. Brown recommended a supportive shoe, rest, icing the affected area each evening and administered another injection.

At her appointment with Dr. Brown on January 31, 2008, Petitioner reported she was 100% symptom free for one to two weeks after the December appointment, but the symptoms gradually recurred. She reported standing extensively at work with the pain prominent with initial weight bearing in the morning and evenings. Dr. Brown noted Petitioner suffered from a severe pes planus foot type. She noted localized tenderness at the plantar medical aspect of the heel with no pain on side-to-side compression of the heel and no Achilles involvement. The

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of working up to 12 hour days on her feet and carrying multiple bags or trays of coins/money weighing up to 25 lbs. could aggravate or accelerate a condition of bilateral plantar fasciitis. (Dep. at 26) However, she had no opinion as to whether the incident of October 12, 2007 in which Petitioner sprained the left ankle could cause, aggravate or accelerate the same condition. (Dep. at 25-6) Dr. Brown did not know whether a flat footed condition, obesity and gender contributed to the condition of plantar fasciitis. (Dep. at 28-30). Dr. Brown also did not recall whether a stool was provided in the toll booth, had no knowledge of the distances Petitioner walked while at work, had no knowledge of the number of stairs she climbed and had no knowledge as to the shifts Petitioner worked.

At Respondent's request, Dr. George Holmes, a board-certified orthopedic foot surgeon with MidWest Orthopedics at Rush examined Petitioner on December 10, 2009. Dr. Holmes described the difference between an orthopedic surgeon and podiatrist as being not only in the training, as the orthopedic surgeon goes to medical school while the podiatrist goes to podiatry school, but also that the orthopedic surgeon can perform a full, comprehensive medical examination of the patient and can admit patients to the hospital. (Dep. at 7) As part of his evaluation, Dr. Holmes was provided with the distance measurements for Plaza 9 and 73. (Dep. at Ex. No. 2)

In December of 2009, Petitioner reported bilateral ankle pain, swelling and increased pain after wearing high heels. Dr. Holmes testified wearing high heels increases the pressure to the foot with little to no cushion, causing greater impact and aggravation to the foot. (Dep. at 12) Dr. Holmes further testified the incident of October 12, 2007 did not cause the condition of plantar fasciitis, as the mechanism of injury and an ankle sprain are not consistent with the diagnosis. (Dep. at 18) Dr. Holmes testified his opinion was also supported by the lack of a temporal connection between the incident in October of 2007 and when she first sought treatment for the symptoms associates with plantar fasciitis on November 30, 2007. (Dep. at 19)

Dr. Holmes further opined Petitioner's activities, including the walking and standing she did as a toll collector, did not cause, aggravate or accelerate the condition of plantar fasciitis. (Dep. at 20-21) Dr. Holmes testified there is no scientific correlation between plantar fasciitis and activities of walking and standing. (Dep. at 20-21) In studies comparing the incidence of plantar fasciitis of those in sedentary occupations to those in occupations that required extensive standing/walking, Dr. Holmes testified, there was no scientific data to show a higher or increased incidence of the condition. (Dep. at 21-22) He further identified several risk factors for the development of the condition, which included obesity and pes planus deformity (flat footedness) as well as a higher incidence of the condition in women when compared to men. (Dep. at 22-23) Dr. Holmes also suggested an underlying enthesopathy needed to be explored in Petitioner's case due to the bilateral nature of her condition, suggesting a blood test was needed to assess whether there was an inflammatory process caused by a C-reactive protein, uric acid and sed rate. (Dep. at 23)

Petitioner testified she continues to experience a sharp pain in her heels. She testified she is unable to wear 2 to 4 inch heels and cannot walk around barefoot. She tries to do mall shopping, but cannot walk more than 200 feet comfortably. She estimated she talks about 800 mg of Ibuprofen 2 times a week.

In support of the Arbitrator's Decision relating to F, whether Petitioner's present condition of ill-being is causally related to the October 12, 2007 accident, the Arbitrator finds the following:

On October 12, 2007, Petitioner stepped in a hole when exiting a toll booth and twisted her left ankle. She sought treatment at Central DuPage Hospital on October 13, 2007 where she was diagnosed with an ankle sprain. She sought no further treatment for the injury.

On November 30, 2007 when Petitioner presented to her family physician, Dr. Nelson, for care, Petitioner did so for complaints of bilateral heel pain and not for symptoms associates with the ankle sprain she sustained on October 13, 2007. Petitioner was thereafter diagnosed with and treated for bilateral plantar fasciitis. Dr. Brown, the treating podiatrist, was unable to relate the condition of plantar fasciitis to the incident of October 12, 2007. (Dep. at 25-26). Dr. Holmes, Respondent's evaluating physician, opined the mechanism of injury and a sprained ankle were not consistent with the subsequent diagnosis of plantar fasciitis. (Dep. at 18-19).

Based on the testimony and opinions of Dr. Holmes, as well as the acknowledgement from Dr. Brown that she could not relate Petitioner's condition of ill-being to the October 12, 2007 accident, the Arbitrator finds Petitioner only sustained a left ankle sprain as a result of the October 12, 2007 accident and she only required treatment on October 13, 2007 for the condition. Petitioner's present condition of plantar fasciitis is not causally related to the accident of October 12, 2007.

In support of the Arbitrator's Decision relating to L, the nature and extent of injury, the Arbitrator finds the following:

Petitioner sustained a left ankle sprain as a result of the October 12, 2007 accident and reached maximum medical improvement by November 30, 2007 when she began to treat for an unrelated condition of bilateral plantar fasciitis. As Petitioner's only injury was a left ankle sprain, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 1% loss of use of the left foot pursuant to Section 8(e)(11).

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Annetta Chisholm,
Petitioner,

vs.

NO: 10WC 6494

Illinois State Toll Highway Authority,
Respondent,

14IWCC0143

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, permanent partial disability, temporary total disability, medical, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 8, 2013, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: FEB 2 7 2014
o022014
CJD/jrc

049

Charles J. DeVriendt

Stephen Mathis

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CHISHOLM, ANNETTA
Employee/Petitioner

Case# **10WC006494**

09WC016028

09WC016027

IL STATE TOLL HIGHWAY AUTHORITY
Employer/Respondent

14IWCC0143

On 2/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2333 WOODRUFF JOHNSON & PALERMO
JAY JOHNSON
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0210 GANAN & SHAPIRO PC
MICHELLE L LaFAYETTE
210 W ILLINOIS ST
CHICAGO, IL 60654

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
CHICAGO, IL 60601-3227

1024 IL STATE TOLL HIGHWAY AUTHRITY
WORKERS COMPENSATION CLAIMS
1 AUTHORITY DRIVE*
DOWNERS GROVE, IL 60515

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 8 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

14IWCC0143

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
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☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Annetta Chisholm
Employee/Petitioner

v.

Illinois State Toll Highway Authority
Employer/Respondent

Case # **10WC 06494**

Consolidated cases: **09 WC 16027 & 09 WC 16028**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Kurt Carlson**, Arbitrator of the Commission, in the city of **Wheaton**, on **December 10, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0143

FINDINGS

On **12/19/2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**37093.16**; the average weekly wage was $**713.33**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **1** dependent child.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $ for other benefits, for a total credit of $**0.00**.

Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

Having found Petitioner failed to prove she sustained accidental injuries arising out of and in the course and scope of her employment by Respondent, the claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

02-08-13
Date

FEB - 8 2013

STATEMENT OF FACTS

Petitioner began working for Respondent in April of 2007. She was originally assigned to Plaza #9, which was near Elgin. In either October or November of 2007, Petitioner testified she was assigned to Plaza #73, which was near Army Trail Road on I-355. At both locations, Petitioner worked as a toll collector, taking toll money from cars and trucks passing through the plaza.

Petitioner described the toll booth as "small" with glass windows on all sides. She testified the floor was made of cement with rubber mats sometimes provided. She testified some toll booths contained multiple rubber mats while other toll booths contained no rubber mat at all. A stool was provided, which Petitioner testified was only to be used during times of low traffic volume. Petitioner estimated she stood for four to seven hours of each shift she worked.

At times, Petitioner worked a "relief shift," which meant she went from booth to booth at the toll plaza in order to break the other toll collectors. When working a relief shift, Petitioner estimated she moved three to eight times in a shift. As all the booths were not on the same side of the highway, Petitioner at times walked an overhead or underground tunnel in order to reach the assigned booth. Petitioner testified she carried her tray, change bag, paperwork and water bottle to each booth. She estimated everything weighed 10 to 25 lbs. Each time she moved to a new booth, Petitioner estimated she walked between 500 and 1500 feet. During her shift, Petitioner wore gym shoes, which she purchased. She acknowledged a particular type of footwear was not mandated by Respondent.

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At Respondent's request, Dr. George Holmes, a board-certified orthopedic foot surgeon with MidWest Orthopedics at Rush examined Petitioner on December 10, 2009. Dr. Holmes described the difference between an orthopedic surgeon and podiatrist as being not only in the training, as the orthopedic surgeon goes to medical school while the podiatrist goes to podiatry school, but also that the orthopedic surgeon can perform a full, comprehensive medical examination of the patient and can admit patients to the hospital. (Dep. at 7) As part of his evaluation, Dr. Holmes was provided with the distance measurements for Plaza 9 and 73. (Dep. at Ex. No. 2)

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14IWCC0143

In support of the Arbitrator's Decision relating to C, did an accident occur that arose out of and in the course and scope of employment, the Arbitrator finds the following:

It is Petitioner's burden to prove by a preponderance of the credible evidence all elements of her claim, including whether the accident arose out of and in the course and scope of her employment. *See*, Hannibal v. Industrial Commission, 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill.Dec. 146 (1977). In this instance, Petitioner alleges she developed a condition of bilateral plantar fasciitis from standing and walking while at work. To establish entitlement to benefits for a repetitive injury, Petitioner must prove her physical structure gave way under the repetitive stresses of usual work tasks. *See*, Darling v. Industrial Commission, 176 Ill.App.3d 186, 530 N.E.2d 1135, 125 Ill.Dec. 726 (1st Dist. 1988).

It is Petitioner's contention she developed bilateral plantar fasciitis from either a specific trauma incident on October 12, 2007 (see the Arbitrator's Decision in the companion case of 09 WC 10628 for why Petitioner did not establish this to be the case by a preponderance of the credible evidence) or as a result of standing/walking required while she was at work. To support her position, Petitioner relied on the testimony of the podiatrist, Dr. Brown. Dr. Brown's opinion Petitioner's work activities either aggravated or accelerated a condition of plantar fasciitis was premised upon a hypothetical question presented to her during her deposition. Dr. Brown's opinion was therefore based on the understanding Petitioner spent up to twelve hours a day on her feet, worked 40 or more hours in a week, spent the majority of her day either standing or walking and carried "multiple" bags or trays of coins/money weighing up to 25 lbs. several times each day. The premise for Dr. Brown's opinion, though, was not supported by Petitioner's testimony or by the other evidence. *See, Carlson v. Caterpillar, Inc.*, 09 IWCC 0155, 2009 WL 686370 (2009) for comparison.

The Arbitrator finds Petitioner did not spend the majority of her day either walking or standing. Petitioner was employed as a toll collector. She worked in a toll booth where fatigue mats were on the floor of each toll booth and a stool was provided for her use. While both Petitioner and Respondent's witness, Doyle, testified the stool was to be used for breaks during lesser periods of traffic volume, Petitioner's attempt to establish she either stood or walked continuously with no breaks is simply not believable. Petitioner worked the 2nd or 3rd shifts. She acknowledged traffic volume was lower during the 2nd and 3rd shifts, which would provide her with ample opportunity to sit and rest on the stool. When Doyle observed Petitioner working, as with most toll collectors, he observed her sitting down, not standing in the toll booth. The position of a toll collector is sedentary. Moreover, the evidence shows Petitioner did not work 12 hour days as she reported to the medical providers or as presented to Dr. Brown in the hypothetical during her deposition. Instead, the evidence showed Petitioner worked on average 6 to 8 hour shifts. She only worked 11 or more hours on 20 different days during an almost two year period.

During her testimony, Petitioner suggested she primarily worked as a "relief" cashier, which required her to move from toll booth to toll booth to break the other toll collectors. However, when she returned to Dr. Brown on January 6, 2009, the history Petitioner provided suggests she had only recently begun working as the relief cashier. She reported to Dr. Brown a "new" job required her to now do a lot of walking, carrying of packages and going up and down stairs several times each day. Before the "new" job, Petitioner reported she was otherwise allowed to stay in one place for the day and not much ambulation was required. The history she provided to Dr. Brown on January 6, 2009 was inconsistent with Petitioner's testimony and suggests the degree of walking she performed in the work place before January of 2009 was substantially less.

Before and immediately after the incident on October 12, 2007, Petitioner had no complaints or symptoms consistent with plantar fasciitis. Following the incident, her activities were limited for a period of time by her need to utilize crutches. As her job was sedentary and Respondent was able to accommodate her need to use crutches, Petitioner continued working as a toll collector. She made no mention of symptoms consistent with plantar fasciitis when seeking medical treatment for the ankle sprain on October 13, 2007. She had no such complaints when seeking treatment for an unrelated knee condition on November 30, 2007. Suddenly, on December 14, 2007, Petitioner reported symptoms of bilateral heel pain with the right being worse than the left reporting the symptoms as part of a regular physical. When she then presents to Dr. Brown for the first time on December 19th, she contended the symptoms had been present for 6 months; yet, she never made mention of the symptoms in October or November when seeking medical treatment.

The Arbitrator recognizes Petitioner did do some walking and standing while working as a toll collector. Dr. Holmes recognized that the while the position was primarily sedentary, it did involve some walking and standing. However, as noted by Dr. Holmes the extent to which Petitioner walked or stood in order to perform her duties as a toll collector did not cause, aggravate or accelerate the condition of bilateral plantar fasciitis. It is also clear Petitioner did not stand on a hard concrete floor while working.

Based on the foregoing, the Arbitrator does not find Petitioner's testimony she constantly stood and walked while working as a toll collector on the 2nd and 3rd shifts credible. The Arbitrator therefore finds Petitioner failed to establish an accident arising out of and in the course of her employment by Respondent. There is no credible evidence to support Petitioner's contention her physical structure gave way to injury under the repetitive stresses of usual work activities.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Salvatore Suera,
Petitioner,
vs.
City OF Chicago,
Respondent,

NO: 12 WC 30623

14IWCC0144

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 8, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

MB/mam
O:2/13/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SUERA, SALVATORE
Employee/Petitioner

Case# **12WC030623**

14IWCC0144

CITY OF CHICAGO
Employer/Respondent

On 8/8/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

JOHN W TURNER LAW OFFICES
132 W NORTHWEST HWY
ARLINGTON HTS, IL 60004

0010 CITY OF CHICAGO
NANCY SHEPARD
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

14IWCC0144

FDSTATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Salvatore Suera
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 12 WC 30623

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **7/24/13**. By stipulation, the parties agree:

On the date of accident, **4/8/10**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned $**62,455.12**, and the average weekly wage was $**1201.06**.

At the time of injury, Petitioner was **59** years of age, ***single*** with **3** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of $**100,198.00** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**100,198.00**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Petitioner suffered an injury to his left shoulder. He is right hand dominant. He ultimately underwent surgery for a rotator cuff tear and biceps tendon tear. He was ultimately returned to work with 30 pound restrictions. He did an independent job search but was ultimately placed in vocational rehabilitation. During vocational rehabilitation, he decided "he did not want to work." (See Px. 4 pg 3). He retired on August 31, 2010 voluntarily and has not looked for work since that time. He testified to ongoing range of motion issues and strength issues with his left arm/shoulder. He did not testify to any pain or to taking any pain medications as a result of this injury. He does not plan to return to the doctor for this injury. Therefore the below is ordered by the Arbitrator.

Respondent shall pay Petitioner the sum of **$664.72**/week for a further period of 88.55 weeks, as provided in Section **8(d)(2)** of the Act, because the injuries sustained caused **17.71% loss of use person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **9/1/12** through **7/24/13**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

David A. Kane
Signature of Arbitrator

August 8, 2013
Date

AUG 8 - 2013

STATE OF ILLINOIS)
)
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☐ PTD/Fatal denied
- ☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Baker,
Petitioner,

vs.

NO: 92 WC 37355

14IWCC0145

City of Chicago,
Respondent.

DECISION AND OPINION ON PETITIONER'S SECTION 8(A) PETITION

On April 23, 1993 Petitioner, a 39 year old auto body shop foreman, sustained an accidental injury arising out of and in the course of his employment. As a result of the accident, Petitioner underwent a three level disc fusion surgery followed by a second surgery consisting of hardware removal. A third surgery was recommended but was declined by the Petitioner. On March 17, 2003 Arbitrator Fratianni awarded Petitioner $667.00 for vocational rehabilitation, $8,101.28 in medical expenses along with ordering Respondent to pay for a psychological evaluation prior to Botox injections and morphine therapy being given. The Arbitrator also found Petitioner was temporarily totally disabled from May 19, 1992 through January 29, 2003 for 553-3/7 weeks and as of January 30, 2003 Petitioner was permanently and totally disabled. No Review was taken of the Arbitrator's decision and the decision became final thirty days after the receipt by the parties.

On October 2, 2009 Petitioner filed a Section 8(a) Petition requesting reimbursement for additional medical expenses which he claims he incurred after the March 17, 2003 Arbitrator's decision was issued. The Section 8(a) Petition was continued numerous times from March 25, 2010 through January 30, 2013. On July 31, 2013 a Review Hearing was held on Petitioner's Section 8(a) Petition. The Commission, after reviewing the entire record, denies Petitioner's Section 8(a) Petition for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified since the January 30, 2003 Arbitration hearing he has received

medical treatment for his work-related low back injury and he has continued under the care of Dr. Earman, an orthopedic surgeon, as well as the APAC pain management doctors. Petitioner said he has been prescribed medications for his back by Dr. Earman and APAC. He identified Petitioner's PX1 as a spreadsheet reflecting various medications attached to a computer printout from Walgreen. He identified the computer printout as medications he received from Walgreens from January 10, 2003 through December 17, 2007. He testified that the computer printout has certain prescriptions highlighted in yellow. The prescriptions that are not highlighted are not related to his work injury and the ones highlighted in yellow are related to his injury. The column on the extreme right is labeled client paid, which he said reflected his out-of-pocket portion for those medications. He denied ever being reimbursed for those out-of-pocket expenses. Petitioner's PX2 is a similar document different in scope from PX1, the earlier document, only for the period of time it covers. It starts in 2008 and ends on September 30, 2010. On cross-examination, Petitioner claims he contacted Respondent many times regarding these prescriptions. He didn't attempt to pay them using a prescription card Respondent gave him and he denied having a prescription card. He claims he was paying for these prescriptions out-of-pocket from 2003 to 2010. He not sure when he contacted his attorney regarding reimbursement for the prescriptions. He doesn't have the actual receipts from Walgreens. Rather, he has a printout from Walgreens. He testified that the prescriptions that are not related to the work accident are for hypertension and sleeping pills.

2. Petitioner's PX1-PX2 exhibits are printouts from Walgreens for January 10, 2003 through December 17, 2007 and January 1, 2008 through September 30, 2010. The original exhibits contained in the file contain yellow highlights. The copies in the transcript are not highlighted. The prescriptions were issued by Drs. Pareja, Dolehide, **Jain**, Glasser, Goodman, **Venhuizan, Tata**, Adlaka, Matheu, **Salman,** Schlenker, **Chang**, Glynn, **Parameswar, King**, Cudecki, Hatfield, Pagni, **Beyranvand, Jamil, Murtaza, McNett** and Shah. The doctors noted in bold represent doctors with treatment records in Petitioner's PX4. If the doctors' names are not noted in bold above, the Commission was not given treatment records for these doctors. Petitioner's PX3 consist of medical records from Dr. Earman for dates of service May 6, 2003 through July 16, 2013.

Having reviewed the entire record, the Commission finds Petitioner did not provide the best evidence. The best evidence would have been the prescriptions themselves as well as the receipts for payment of the same. Instead, Petitioner provided printouts from Walgreens along with a spreadsheet that is not in chronological order. Secondly, Petitioner didn't supply all of the treatment records to cover these prescriptions. The Commission finds that the treatment records are limited to Drs. Jain, Tata, Venhuizan, Salman, Chang, Parameswar, King, Beyranvand, Jamil, Murtaza, McNett. There are no treatment records for Drs. Pareja, Dolehide, Glasser, Goodman, Adlaka, Mathey, Schlenker, Glynn, Cudecki, Hatfield, Pagni or Shah. Given the treatment records the Commission was given, the Commission finds that some of the prescriptions may possibly match up with the treatment records. However, again there is no indication that Petitioner received these prescriptions as a result of these treatment or

that Petitioner paid for the same. The Commission also reviewed Respondent's RX1 and found it was not helpful in demonstrating what was paid as no specifics were given and payment was for a range of dates. Given the evidence at hand, the Commission finds that it is Petitioner's burden to prove up each and every element of his case. The Commission further finds that the best evidence was not provided in this case. The Commission finds that while there are some treatment records that may match up with the prescription dates, it is difficult to match up the same and it would be pure speculation that the prescriptions correspond to the treatment records. As such, the Commission denies Petitioner's Sec. 8(a) Petition.

IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Section 8(a) Petition is hereby denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

MB/jm

O: 1/16/14

43

Marie Basurto

David L. Gore

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF DEKALB)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aaron Hernandez,

Petitioner,

vs.

NO: 08 WC 20590

LUNA,

14IWCC0146

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of denial of reinstatement and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 16, 2011 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 27 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:2/13/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
ORDER TO DISMISS CASE FOR WANT OF PROSECUTION

ATTENTION. The parties have 60 days from the receipt of this order to file a *Petition to Reinstate Case*.

AARON HERNANDEZ
Employee/Petitioner

v.

LUNA
Employer/Respondent

Case # **08** WC **20590**

DEKALB

14IWCC0146

After this case was filed by the petitioner, all parties received due notice, but the petitioner failed to appear at a status call or trial date. Accordingly, as provided by law, I order that this case is dismissed for want of prosecution.

Signature of arbitrator or commissioner

6/16/11
Date

14IWCC0146

ILLINOIS WORKERS' COMPENSATION COMMISSION

FILED
2011 JUL 21 PM 3:21
ILLINOIS WORKERS' COMPENSATION COMMISSION

AARON HERNANDEZ,)
Petitioner,)
-vs-) NO: 08 WC 020590
LUNA EQUIPMENT INC.)
Respondent.)

MOTION TO VACATE DISMISSAL FOR WANT OF PROSECTION

Petitioner, AARON HERNANDEZ, by his attorney, THE VRDOLYAK LAW GROUP, LLC, MICHAEL P. CASEY, and moves the Illinois Workers' Compensation Commission to Vacate Dismissal for Want of Prosecution entered June 16, 2011 and in support states:

1. This matter was set for hearing before Honorable Arbitrator Edward Lee on June 16, 2011 at the DeKalb Calendar.

2. Petitioner's office had inadvertently listed the matter as on the Chicago calendar.

3. Petitioner's attorney did appear before Arbitrator Pulia at the Chicago calendar that date for pending claims (Gonzalez v. El Cuaco 08 WC 20592).

4. Petitioner's attorney discovered that the Hernandez v. Luna was not on the call before Arbitrator Pulia but was in fact set before Arbitrator Lee in DeKalb. Consequently no one appeared before Arbitrator Lee.

5. Failure to appear was through inadvertence.

6. Therefore, Petitioner asks the Illinois Workers' Compensation Commission to reinstate the case to allow Petitioner to present his claim.

VRDOLYAK LAW GROUP, LLC

By: MICHAEL P. CASEY, Attorney for Petitioner

THE VRDOLYAK LAW GROUP, LLC
By: Michael P. Casey #2221
Attorney for Petitioner
741 N. Dearborn Street
Chicago, IL 60654
(312) 482-8200

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacqueline Merritt,

Petitioner,

vs.

NO: 11 WC 12585

14IWCC0147

Brightside Adult Day Service,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, medical expenses, prospective medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 1, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0147

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:2/13/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

MERRITT, JACQUELINE
Employee/Petitioner

Case# 11WC012585

14IWCC0147

BRIGHTSIDE ADULT DAY SERVICE
Employer/Respondent

On 7/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 LAW OFFICE OF JIM BLACK & ASSOC
BRAD A REYNOLDS
308 W STATE ST SUITE 308
ROCKFORD, IL 61101

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
ARIK HETUE
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

14IWCC0147

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jacqueline Merritt
Employee/Petitioner

v.

Brightside Adult Day Service
Employer/Respondent

Case # 11 WC 012585

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Douglas J. Holland**, Arbitrator of the Commission, in the city of **Rockford**, on **June 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

IN AND BEFORE THE
ILLINOIS WORKERS' COMPENSATION COMMISSION

Jacqueline Merritt, Employee/Petitioner,	)	
v.	)	Case No. 11 WC 012585
Brightside Adult Day Service, Employer/Respondent.	)	

STATEMENT OF UNDISPUTED FACTS

Petitioner Jacqueline Merritt worked for Brightside Adult Day Service as a CNA. Petitioner worked for the Respondent for four years. Petitioner testified her primary duties as a CNA included: care for the elderly, taking residents to the bathroom, doing activities, and preparing lunch.

Petitioner testified that she sustained injury to her left wrist and left elbow on February 17, 2011. Ms. Merritt testified that the injury date was an activity date at the facility. Ms. Merritt described that one of the residents, who was 90 years old and weighed 200 pounds, tried to dance and the resident began to fall. Ms. Merritt, who is left handed, grabbed the resident with her left wrist and arm to hold him up so that he would not fall and break his hip. Ms. Merritt testified that she got the resident safely to a chair, but immediately her left hand became swollen. Ms. Merritt testified that when she grabbed the resident, she felt a burning sensation up to her left elbow and had swelling in her left wrist. Respondent does not dispute accident. See Arbitrator's Exhibit No. 1.

DISPUTED ISSUES

F. Is Petitioner's current condition of ill-being causally related to the injury?

Initially the Petitioner was seen at the direction of her employer at Brookside Immediate Care. The nurse's note from February 17, 2011 records history that the Petitioner was trying to keep a patient from falling when she hurt her left wrist. PX 1. Petitioner was seen by Dr. Shuttari who noted similar history that the Petitioner was trying to prevent a patient from falling and in the process, she sprained her left wrist. PX 1. Physical examination of the left wrist showed tenderness over the radial aspect. Range of motion of the wrist was markedly limited. X-ray of the left wrist showed questionable distal radial fracture. PX 1.

The diagnosis was left wrist sprain with questionable fracture of the distal radius. Petitioner was placed in a Colles splint. She was given extra strength Tylenol and placed on a work restriction of right hand duty only. The patient was given 60 milligrams of Toradol. PX 1.

14IWCC0147

FINDINGS

On the date of accident, **2-17-11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$17,576.00**; the average weekly wage was **$338.00**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$3,637.47** for TTD, **$0** for TPD, **$0** for maintenance, and **$7,909.99** for other benefits, for a total credit of **$11,547.46**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

The Respondent is ordered to authorize and pay for the surgeries to the left wrist and left arm prescribed by Dr. Charles Carroll.

The Respondent shall pay Petitioner $225.33 per week for a period of 118 &1/7 weeks from 3-7-11 through 6-11-13 for temporary total disability, and the Respondent shall be entitled to a credit of $3637.14 for payments already made.

The Respondent shall pay Petitioner $3006.00 for outstanding medical after 7-1-11, and be entitled to a credit of $7909.00 for medical paid prior to 7-1-11 pursuiant to Section 8(j) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Douglas J Holland

Signature of Arbitrator

6-26-13

Date

ICArbDec19(b)

JUL - 1 2013

Subsequently, nurse's notes reflect that the Petitioner contacted Brookside Immediate Care on February 23, 2011 reporting that her **left arm** was killing her and she was asking to be seen. Petitioner was then seen on February 24, 2011. In the nurse's notes, it was noted that the Petitioner was being seen in follow-up of her left arm. Petitioner reported significant pain and complained of swelling of her left wrist, even after elevation. **Petitioner also complained of a burning sensation in her left arm in history given to the nurse.** PX 1.

Petitioner was seen by Dr. Shuttari on February 24, 2011. Dr. Shuttari noted her complaints of pain with markedly limited range of motion. Physical examination of her left wrist demonstrated significant tenderness over the distal aspect of the radius with marked limited range of motion. Poor left hand grip was also noted secondary to pain. PX 1. Repeat x-rays were performed. At that time, it was recommended that the Petitioner be evaluated by an orthopedic physician. She remained on work restrictions of right hand duty only. She was to continue with the Colles splint. PX 1.

Petitioner was next seen by orthopedic physician, Dr. Milos on March 2, 2011. Dr. Milos noted her history that she was helping a client from falling when she twisted her left wrist and sustained a direct injury. Dr. Milos noted no previous problems with the wrist. *Since the date of the injury, the Petitioner had pain in her left wrist, and also a burning pain in her forearm.* PX 2. Physical examination revealed tenderness to palpation over the radius distally of the left wrist. She had stiffness with range of motion, secondary to pain. X-rays were reviewed, which demonstrated what appeared to be an old distal radius fracture. Dr. Milos diagnosed a left wrist injury. PX 2. Dr. Milos recommended an MRI scan of the left wrist to rule out other abnormalities. She was kept on modified duty to only work with her right hand. PX 2.

In initial history taken by the nurse on March 2, 2011, it was noted that she was to be evaluated for left wrist upper extremity complaints to include her wrist and her arm. It was noted that she had sustained injury when a client she was caring for was falling and the patient had attempted to break the fall by using her left wrist to grab the patient and sustained a twisting injury. PX 2. Ms. Merritt was next seen by Dr. Milos on April 6, 2011. She continued to have significant complaints of pain in her left wrist. On physical exam, she had pain with movement of the **wrist and elbow.** The MRI was reviewed, which revealed some degenerative changes of the TFCC. Dr. Milos recommended physical therapy with modalities and desensitization exercises with the left wrist. PX 2. Dr. Milos was concerned of some early signs of chronic regional pain syndrome, which he felt could be addressed in physical therapy. She was continued on right-handed work only. Ms. Merritt then completed a course of physical therapy with little or no improvement in her symptoms.

On October 17, 2011, Dr. Milos recommended an FCE to determine final work restrictions. PX 2. She continued to remain on light-duty work under the care of Dr. Milos through November 17, 2011. PX 2. Petitioner was then examined for an IME by Dr. Hagman on October 6, 2011. A valid hearsay objection to Dr. Hagman's IME report was sustained. Thereafter, the Petitioner was sent for an IME arranged by the Respondent with Dr. Vender. As part of Dr. Vender's IME, an EMG of the left upper extremity was performed on June 29, 2011. The history noted in EMG was of intermittent second, third, and fourth digit tingling and burning with occasional radiation up the dorsal forearm, lateral arm/elbow with associated stiffness, and hand weakness following the work injury on February 17, 2011. PX 4. The EMG revealed mild left ulnar neuropathy across the left elbow and it was considered an abnormal exam. PX 4.

Dr. Vender performed an IME at the request of the Respondent on June 2, 2011. RX 2-3. Dr. Vender noted Petitioner's history of sustaining injury to her left upper extremity on February 17, 2011 when she was trying to catch a patient from falling and twisting her wrist. At the time of Dr. Vender's IME, Petitioner complained of mild pain in her wrist with more significant burning sensation in her forearm up to her elbow. Dr. Vender noted intermittent tingling in the index, middle, and ring fingers. RX 2. Physical examination revealed multiple areas of tenderness across the distal radius. There was also tenderness noted along the distal half of the ulnar border. X-rays showed a healed ulnar styloid fracture. Dr. Vender's diagnosis was status post injury left wrist. RX 2. Dr. Vender reviewed x-rays and previous diagnostic studies. Based on her complaints of forearm numbness and tingling as well as intermittent numbness in the fingers, Dr. Vender ordered an EMG. RX 2. Dr. Vender did not feel the MRI of the left wrist, which demonstrated some fraying of the TFCC, explained her symptoms. RX 2. Dr. Vender felt the Petitioner could work but if she was going to perform heavy lifting, she needed a wrist support. RX 2. Dr. Vender then issued a second report dated July 1, 2011, after review of the EMG. Dr. Vender noted the results of mild ulnar neuropathy at the left elbow, but opined that the Petitioner's injury was a twisting injury to the wrist and that would not contribute to ulnar neuropathy at the elbow. RX 3.

Respondent denies that Petitioner's current condition of ill-being regarding her left wrist and elbow are causally related to her February 17, 2011 work injury, based upon the IME opinions of Dr. Vender.

In support of causal connection, Petitioner offered the treating records of Dr. Charles Carroll. PX 5. Dr. Carroll first examined the Petitioner on September 14, 2012 after receiving authorization from the Respondent to do so. PX 7. Dr. Carroll noted Petitioner's history of injury on February 17, 2011, followed by pain and loss of function of Petitioner's left wrist and elbow after helping a patient from falling and twisting her left wrist. PX 5. Dr. Carroll noted Petitioner's ongoing complaints of a burning sensation in her left forearm and elbow, as well as numbness and tingling in her left hand. Dr. Carroll noted previous x-rays and EMG results. Wrist and elbow pain were described as disabling. Dr. Carroll reviewed medical records, as well as the IME opinion of Dr. Vender. PX 5. Dr. Carroll performed physical examination. Provocative testing for compressive neuropathy was positive at the ulnar nerve of the left elbow. Petitioner was tender over the left ulnar nerve and had a positive compression test to the groove. The neurological exam was positive for left sided carpal tunnel, left cubital tunnel, and radial nerve compression at the elbow. Phalen's and Tinel's tests of the median nerve were positive on the left. Elbow flexion tests in ulnar nerve compression tests at the elbow were positive. X-rays were obtained by Dr. Carroll on the initial date of consultation. Diagnosis was left CTS and left ulnar neuritis causally related to the February 17, 2011 work injury. PX 5.

Dr. Carroll placed the Petitioner on a work restriction of no lifting greater than 10 pounds and no forceful grasp. PX 5. Dr. Carroll recommended left carpal tunnel release and left ulnar nerve release. Dr. Carroll opined that additional conservative treatment, including additional therapy, would not alleviate the Petitioner's symptoms. PX 5. No additional testing was indicated. Dr. Carroll specifically opined that elbow surgery only would not solve the Petitioner's problems and that she would need carpal tunnel release as well. PX 5. Dr. Carroll opined that observation alone would not solve the Petitioner's left wrist and elbow problems. Only surgery of the left wrist and left elbow would resolve Petitioner's symptoms, according to Dr. Carroll. PX 5.

Dr. Carroll then re-evaluated the Petitioner on March 4, 2013. At that time, she still had tingling in the ulnar elbow and occasionally to her fingers of her left hand. Petitioner was ready to proceed with surgery upon approval by the Respondent. Her symptoms were unchanged. She remained on work restrictions of no use of her left arm at that time. PX 5. Physical examination of the left elbow revealed provocative testing for compressive neuropathy at the ulnar nerve at the elbow and positive ulnar neuritis on left compression, Tinel and Ulnar Nerve Compression tests. PX 5. Neurologically, Petitioner was positive for left CTS and left cubital tunnel syndrome with positive Phalen's and Tinel's tests. Diagnosis continued to remain lesion of the left ulnar nerve and left CTS following work injury. PX 5.

The Arbitrator finds that the Petitioner sustained her burden of proving her current condition of ill-being regarding her left wrist and left elbow are causally related to her February 17, 2011 work injury. Several reasons support this finding. First, Petitioner sustained injury to her left upper extremity after grabbing a 90 year old resident, who weighed 200 pounds, so that he would not fall. Medical records describe a twisting injury, which Petitioner sustained on February 17, 2011. The Respondent does not dispute accident.

Petitioner had no significant past medical history concerning her left upper extremity. Prior to the date of injury, Petitioner was not actively treating for her left wrist nor her left elbow. Petitioner was working full-duty in a heavy job without any work restrictions until the injury date. Petitioner's symptoms were immediate and contemporaneous with her work injury. She was seen on the date of injury with complaints of left wrist pain and swelling. Less than one week later, she called the occupational clinic and reported her left arm was killing her. In nurse's notes at her second visit to Brookside Immediate Care, she complained of left wrist and left forearm and elbow pain. Specifically, she reported swelling of her left wrist even after elevation **and** a burning sensation in her elbow. Left wrist weakness and diminished grip strength on the left were noted in her early on medical records, symptoms which were consistent with CTS.

When seen by Dr. Milos, on referral from the occupational clinic, it was clear that she was evaluated for left wrist and left arm (elbow) pain. Dr. Milos' physical exam on April 6, 2011 revealed positive pain at the wrist and the left elbow during provocative testing. Respondent's own expert noted her history of numbness of tingling in her fingers, and the EMG ordered by the Respondent's IME doctor was positive for left ulnar neuropathy. Taken together, the above facts demonstrate Petitioner's left wrist and elbow symptoms were the direct result of her February 17, 2011 injury.

Second, the Arbitrator is persuaded and credits the opinion of Dr. Carroll over that of Dr. Vender. Dr. Carroll considered Petitioner's mechanism of injury, all her prior records, and the opinions of Dr. Vender. Dr. Carroll, who is well reputed, noted positive clinical exam findings for the left wrist and left elbow neuropathies in addition to objective studies to support the same. The Arbitrator is persuaded by the opinion of Dr. Carroll and adopts it.

J. Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent denied liability for any medical treatment after July 1, 2011, based upon the opinion of Dr. Vender. The Arbitrator finds the Petitioner sustained her burden of proving causal connection. There is no opinion offered by Dr. Vender or any other medical provider that treatment rendered to the date of the parties' hearing was unreasonable or unnecessary. The Arbitrator finds Petitioner's treatment was reasonable and necessary through the date of hearing to treat the Petitioner's condition of ill-being. Respondent is ordered to pay the following unpaid medical bills, pursuant to the Illinois Fee Schedule:

Medical Provider	Date(s) of Service	Unpaid Balance
Orthopedic Rehab Specialists (ORS)	10/27/11-11/18/11	$1,884.00
North Shore University Hospital	9/14/12	$674.00
Rockford Radiology	3/14/11-9/14/12	$448.00

Respondent is entitled to a credit in the amount of $7,909.00 for medical benefits previously paid to various medical providers for treatment prior to July 1, 2011, pursuant to 8(j) of the Act.

K. Is Petitioner entitled to any prospective medical?

The Arbitrator is persuaded by the opinions of Dr. Charles Carroll. Petitioner has a diagnosis of work-related left CTS and left ulnar neuropathy. Surgery to the left wrist and left elbow are recommended by the treating surgeon. The Arbitrator orders the Respondent to authorize both left wrist and left elbow surgery.

L. What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ■ TTD

Respondent disputes liability for TTD based upon the opinions expressed by Dr. Vender. Respondent disputes the duration of TTD benefits based on Dr. Vender's opinion that the Petitioner could perform work with a wrist splint if it involved heavy lifting. Petitioner was treated at the direction of the employer at Brookside Immediate Care, where she was placed on a work restriction of no use of her left upper extremity- right hand work only. Petitioner is left hand dominant. When seen by Dr. Milos at Lundholm Surgical Group, she continued on a right hand work only restriction through October of 2011. When seen by Dr. Charles Carroll in September of 2012, Dr. Carroll continued to confirm that the Petitioner could not work full-duty, but required light-duty restrictions.

Petitioner testified that the Respondent failed to offer any light-duty work to her following the injury and while she remained on work restrictions. Petitioner testified that no light-duty work had been offered at any time by the Respondent prior to the parties' hearing date.

The Arbitrator finds that the Petitioner is not capable of performing full-duty work, based on the opinions expressed in Petitioner's treating records, as well as the opinion of Dr. Charles Carroll. When last seen on March 14, 2013, the Petitioner continued to remain highly symptomatic and she remained under the care of Dr. Carroll who was awaiting authorization for left wrist and left elbow surgery. Petitioner performs heavy work as a CNA. Petitioner is left hand dominant. The Arbitrator finds the Petitioner is not capable of full employment since the injury date until the time of the parties hearing. Based on the principals articulated in *Interstate Scaffolding v. The Illinois Workers' Compensation Commission* and since the Petitioner has not achieved MMI, the Arbitrator orders the Respondent to pay TTD benefits from March 7, 2011 through June 11, 2013, or 118 and 1/7 weeks of TTD. Respondent is entitled to a credit for TTD previously paid from March 7, 2011 through June 6, 2011 in the amount of $3,637.47.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Palermo,
Petitioner,
vs.
Proviso Township HSD #209,
Respondent,

NO: 12 WC 20320
14IWCC0148

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, permanent partial disability, medical expenses, penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 19, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

MB/mam
O:2/13/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PALERMO, JAMES
Employee/Petitioner

Case# **12WC020320**

14IWCC0148

PROVISO TOWNSHIP HSD #209
Employer/Respondent

On 4/19/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0311 KOSIN LAW OFFICE LTD
MARILYN KOSIN
134 N LASALLE SUITE 1340
CHICAGO, IL 60602

0863 ANCEL GLINK
ERIN BAKER
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

14IWCC0148

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
X ☐ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

James Palermo
Employee/Petitioner

v.

Proviso Township HSD #209
Employer/Respondent

Case # **12** WC **20320**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **March 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **May 15, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment. In light of this finding, the Arbitrator views the remaining disputed issues as moot.

Timely notice of this accident *was* given to Respondent.

In the year preceding the injury, Petitioner earned **$55,763.78**; the average weekly wage was **$1,072.38**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00**.

ORDER

Petitioner lacked credibility and failed to prove he sustained an accident on May 15, 2012 arising out of and in the course of his employment by Respondent. Compensation is denied. The Arbitrator views the remaining disputed issues as moot.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Molly C Mason
Signature of Arbitrator

April 19, 2013
Date

APR 19 2013

James Palermo v. Proviso Township High School District #209
12 WC 20320

Arbitrator's Findings of Fact

Petitioner was 56 years old as of the March 6, 2013 hearing. T. 9. Petitioner testified he has worked for Respondent for 8 ½ years. T. 9. He began working at his present location, the Proviso Math & Science Academy, about 7 years ago. At that location, he has always worked as a night custodian. T. 10. His shift starts at 4:00 PM and ends at midnight. T. 10. His duties include cleaning and maintaining classrooms. As of May 2012, his supervisor was Calvin Taylor, Respondent's "night time custodian." T. 11.

Petitioner testified he felt "all right" before May 2012. T. 11. He acknowledged taking time off work on three or four occasions between January 1, 2012 and May 15, 2012. He took this time off due to low back pain and colds. T. 12. He completed forms in connection with these absences, per Respondent's protocol. He gave the forms to a receiving clerk who turned them in to the main office. T. 12-13. "Absence Request" forms offered into evidence by Respondent reflect that Petitioner took the following days off due to back pain between January 1, 2012 and May 15, 2012: February 22-24, March 29 and April 16.

Petitioner denied undergoing any low back treatment between January 1, 2012 and May 15, 2012. He did not have a personal physician during this period. T. 13.

Petitioner testified he reported for work at 4:00 PM on May 15, 2012. During the next three hours, he vacuumed, swept halls and cleaned the library and a couple of other rooms. He did all of this work on the third floor, his assigned work area. No other custodian was assigned to the third floor that evening. Other custodians worked on the first and second floors. T. 14-15.

Petitioner testified he customarily used a wheeled cart to transport his mop, broom, bucket and cleaning supplies. T. 16. The cart was about 3 ½ feet long and 2 ½ feet wide. The cart is shown in the photograph marked as PX 1. T. 17. He stored this cart in one of two closets on the third floor. Employees commonly referred to these closets as "kitchens" but the closets did not contain conventional kitchen appliances. T. 17-18. One of the third floor "kitchens" was about 10 feet by 10 feet in size. The other was smaller. Each "kitchen" contained a commercial sink (made of concrete, T. 33) and various supplies. The sinks were about 3 or 4 feet above the floor. The larger "kitchen" also contained a wheeled folding chair (depicted in PX 3) and a table. The legs of the chair angled slightly outward. The "kitchens" were kept locked. Petitioner and Respondent's other custodians had keys, as did the supervisors. T. 19.

Petitioner identified PX 2 as a photograph of the interior of the larger third floor "kitchen." PX 2 shows the sink, a bucket and a hose running from the sink faucet. T. 23-24. Petitioner testified he uses this hose to fill his mop bucket with water. T. 24.

Petitioner testified that his claimed work accident occurred at about 7:00 PM on May 15, 2012. Shortly before the accident, he mopped the north stairwell between the second and third floors. He then went to the larger third floor "kitchen" to change the water in his bucket. T. 26. Immediately before the accident, the double doors to the "kitchen" were open and the cart was positioned so that about half of it was inside the "kitchen." T. 27-28. He lifted the bucket and poured some dirty water down the sink drain. He did not spill any water on the floor when he did this. T. 28. He put the bucket on the cart. He then grabbed his mop with his left hand. T. 32. As he did this, his right foot got caught underneath the cart and his left foot got caught underneath the chair, which was to his left, about 2 or 2 ½ feet from the sink. T. 31. He was wearing work shoes when this happened. T. 38. The back of one of his shoes hit a wheel on the chair. T. 38. He "had no leverage" and fell "all the way back," striking his left shoulder, left elbow and neck against the sink. His head went inside the sink. T. 33. The photograph marked as PX 4 shows the sink and the area where he landed. He believes he lost consciousness. He was "in and out," awareness-wise, thereafter. T. 38-39.

Petitioner testified the bucket was about half full when he fell. He believes he must have knocked the bucket over when he fell because he was all wet when he "woke up." He was still holding the mop handle in his left hand when he came to. The mop had fallen between the supply rack and the drain. When he "came to," he saw his walkie-talkie and used it to call Calvin Taylor, another custodian. T. 39. He told Taylor, "come to the 'orange side' closet, I hurt myself." Taylor showed up about five minutes later. T. 39. Petitioner did not radio anyone else. T. 40. Petitioner testified he did not move between the time he fell and the time Taylor arrived. T. 40. He believes Taylor was alone when he arrived. He told Taylor he had fallen. T. 41. He thinks Taylor called Ron Anderson, the building manager. Anderson was on the premises because a board meeting was taking place in the auditorium at 7:00 PM that night. T. 41. Anderson arrived while Petitioner was still in the "kitchen." T. 42. Paramedics arrived at some later point and took Petitioner to Loyola University Medical Center via ambulance. T. 41-42.

Petitioner testified he "woke up" due to pain while en route to the hospital as paramedics inserted an IV line into his arm. T. 43.

The Loyola University Medical Center records show that paramedics from the Forest Park Fire Department brought Petitioner to the Emergency Room at 8:21 PM on May 15, 2012. The paramedic run sheet is not in evidence. One of the Emergency Room histories reflects that Petitioner "tripped and fell" and experienced a "questionable" loss of consciousness thereafter. Emergency Room personnel described Petitioner as alert, oriented and "speaking in full and clear sentences." Petitioner complained of "L shoulder pain, HA, neck pain and tinnitus." Petitioner rated his pain level at 8/10. Petitioner denied shortness of breath and chest pain. He also denied nausea, vomiting and dizziness. He was placed on cardiac and other monitors. Dr. Reingold, the Emergency Room physician, obtained the following history:

> "Pt presents to the ED with a CC: fall w/ injuries to head, neck L shoulder. Onset just prior to arrival,

severity mod, quality ache location: as noted. Pt slipped on wet floor. No pre-syncope. Doesn't remember whether he had LOC but thinks he might have. Denies injury to back or LEs or RUE. Some bilateral tinnitus that is new."

Dr. Reingold noted that Petitioner's medical history was significant for hypertension and diabetes. He administered an injection of Morphine for pain. He indicated Petitioner was wearing a cervical collar. On examination, he noted no ecchymoses to the head, no focal weakness to the face or extremities, no signs of intoxication, some tenderness to the neck, posterior left shoulder and left elbow and "nearly full pronation/supination of elbow." He ordered X-rays of the left shoulder and elbow and CT scans of the head and cervical spine along with an EKG and blood work. The X-rays were negative. The head CT scan revealed evidence of "chronic small vessel ischemic disease." [The radiologist noted he compared this CT with a head CT scan taken on January 4, 2010.] The cervical spine CT scan was described as negative, with a radiologist ruling out subluxation at C2-3. The EKG showed "80 bpm bigeminy, an effective pulse of 48, a T wave abnormality and a prolonged QTC." The interpreting physician compared this EKG with one performed on January 4, 2010 and noted that "ventricular premature complexes" had developed. At about 12:32 AM on May 16, 2012, Dr. Reingold noted that he discussed the need for hospitalization with Petitioner and warned of "the possibility of passing out or heart attack," but that Petitioner indicated he was able to walk around, "felt fine and wanted to go home and see his own cardiologist." Dr. Reingold indicated he told Petitioner "he needed to stay and there was a serious risk to his health." Regardless, Petitioner signed out "AMA" and left the hospital. The discharge time is recorded as 12:42 AM on May 16, 2012. A nurse indicated that, when Petitioner left, he walked with a "steady, strong and even" gait, "without any s/s of distress," and "provided self transport." PX 1.

Petitioner testified he underwent a cardiac bypass in 2000. T. 44. Petitioner further testified that a physician at the Emergency Room told him his heartbeat was irregular. T. 44. Petitioner indicated he felt able to leave the hospital and go home due to the effects of the Morphine, which he described as a miracle drug. T. 45. He felt "hurt and sore" but "didn't think it was that bad." T. 45. Per instructions he received at the Emergency Room, he called his cardiologist, Dr. Bajgrowicz, the next day and saw this doctor on May 17, 2012. Dr. Bajgrowicz is the physician who performed his cardiac bypass. T. 47.

Dr. Bajgrowicz's note of May 17, 2012 sets forth the following history:

"The patient is a 55-year-old male who presents to our office for evaluation after a fall at work. He states that this Tuesday while at work he fell backwards and now complains of having headache as well as left shoulder and left elbow pain. He was evaluated at Loyola's emergency room where [a] CAT scan and other X-rays were performed. According to the patient the tests were all negative. He now complains of having dizziness

and ringing in the ears. Denies any nausea, vomiting, blurred vision or double vision. He also complains of having cough productive of clear to yellow phlegm. He denies any chest pain. He denies syncopal episode."

Dr. Bajgrowicz also noted that Petitioner had undergone a coronary bypass in November of 2000 and had sustained a myocardial infarction on October 27, 2004.

Dr. Bajgrowicz noted no abnormal examination findings other than a Grade !/V! systolic ejection murmur at the left sternal border. He described Petitioner's neck as "supple." He did not indicate that Petitioner was wearing a sling or other device.

With respect to Petitioner's current complaints, the doctor diagnosed a "presumed mild concussion" and a "productive cough, most likely upper respiratory infection with possible component of bronchitis." He started Petitioner on a Z-Pak and instructed Petitioner to follow up with his primary care physician and return to the Emergency Room if he failed to improve. PX 8.

Petitioner testified that Dr. Bajgrowicz's receptionist completed an accident form at his request. T. 51. He testified he was unable to complete the form because he is left-handed and his left arm was in a sling. Petitioner identified PX 6 as this form. Petitioner testified that none of the handwriting on PX 6 is his. T. 52. The form, entitled "Employee's Report of Injury," reflects that Petitioner was injured at 7:30 PM on May 14, 2012 inside a "janitor's kitchen." Petitioner testified that the doctor's receptionist put the wrong date of accident on the form and that he advised Respondent of this error when he turned in the form. The mechanism of injury is described as follows: "put bucket in cart, stepped back & believe tripped over a chair." The form reflects that Petitioner injured his left shoulder, head, neck and back. The word "no" appears in response to the question: "have you ever injured the same part of your body before?" The word "yes" appears in response to the question: "have you ever injured any other part of your body before?" followed by a reference to a pelvic injury stemming from a car accident. [Petitioner testified that this accident occurred in 1995. T. 55] PX 6 is not signed. Respondent offered the same form into evidence as "Exhibit 1" to its response to Petitioner's petition for penalties and fees. RX 3. Exhibit 1 appears to bear Petitioner's signature and the date "5/17/12."

Petitioner testified that Dr. Bajgrowicz told him his heartbeat was fine. T. 48. Petitioner further testified that he had no personal physician as of May 17, 2012 and Dr. Bajgrowicz referred him to Dr. Dubin. T. 48. Petitioner testified he saw Dr. Dubin on May 22, 2012. Petitioner denied seeing Dr. Dubin at any point prior to May 22, 2012. T. 49.

Dr. Dubin's note of May 22, 2012 reflects that Petitioner "fell at work tripping over ralling [sic] chair" the previous week. The note also reflects that Petitioner complained of constant pain "from his neck down to lower back," ringing in his ears and difficulty walking. The

doctor noted that Petitioner had undergone imaging studies at an Emergency Room. He also noted a history of cardiac artery disease, hypertension, diabetes and hyperlipidemia.

Dr. Dubin described Petitioner as walking with an antalgic gait "due to evident back pain." On examination, Dr. Dubin noted an abnormal heel/toe walk, trigger points in the back and neck, a positive cervical compression test with radiation to both shoulders and mid-thoracic paraspinal tenderness with muscle spasm. He diagnosed post-concussion syndrome as well as cervical, thoracic and lumbar strains. He prescribed "home rest," a home exercise program, Vicoprofen, Fioricet and Flexeril. PX 9.

Petitioner returned to Dr. Dubin on June 5, 2012 and complained of persistent neck and lumbar pain, as well as persistent headaches and nausea. Petitioner reported that the prescribed medication was not controlling his pain.

Dr. Dubin's examination findings and diagnoses were essentially unchanged. He instructed Petitioner to discontinue the Vicoprofen, continue the Flexeril and start Norco. He also instructed Petitioner to stay off work and start therapy the following week. PX 9.

At the next visit, on June 12, 2012, Dr. Dubin noted essentially the same complaints and findings. He again diagnosed post-concussion syndrome and cervical, thoracic and lumbar strains. He prescribed therapy and an MRI [there is no indication as to which body part was to be scanned]. He added Gabapentin and Elavil to Petitioner's medication regimen and continued to keep Petitioner off work. PX 9.

Petitioner testified he did not undergo an MRI in connection with this claim. T. 61. No MRI report is in evidence.

Petitioner filed an Application for Adjustment of Claim on June 12, 2012 alleging a "trip and fall" of May 15, 2012 and injuries to the head, "entire back" and left shoulder. The Application lists a prior claim numbered 88 WC 1699 and describes this case as "settled." Arb Exh 2.

On June 19, 2012, Petitioner underwent an initial physical therapy evaluation at Gottlieb Memorial Hospital. A "physical therapy face sheet" reflects the following diagnosis: neck and low back pain. A "patient information form" signed on June 19, 2012 reflects that Petitioner complained of back pain and responded "yes" to a question asking whether he had fallen during the past sixty days. A "back evaluation report" dated June 19, 2012 reflects that Petitioner reported falling at work on May 15, 2012, suffering a concussion and striking his neck and back. Petitioner complained of pain in his neck and back as well as "occasional left upper extremity numbness and tingling." Petitioner began attending therapy following this evaluation. PX 10.

Petitioner returned to Dr. Dubin on June 26, 2012 and reported he was attending therapy and walking more easily but still experiencing headaches. The doctor's findings and

diagnoses were unchanged. He instructed Petitioner to continue attending therapy and taking the prescribed medication. He again kept Petitioner off work. PX 9.

On July 10, 2012, Petitioner complained to Dr. Dubin of constant headaches, leg weakness and fatigue. The doctor noted that Petitioner was progressing slowly with therapy. The doctor noted an antalgic gait and a limited arm swing. He also noted decreased strength, "left more than right." He added "insomnia" and "left L5 radiculopathy" to Petitioner's current diagnoses. He prescribed Zolpidem to help with sleep along with four more weeks of therapy. He continued to keep Petitioner off work. PX 9.

Petitioner continued attending therapy thereafter. On August 7, 2012, a therapist completed a progress report reflecting that Petitioner was still experiencing headaches and was complaining of upper trapezius and superior scapular pain. The therapist indicated Petitioner might benefit from four weeks of therapy. An illegible physician's signature appears at the bottom of this form, with the physician indicating Petitioner was to be discharged from therapy. PX 10.

On August 10, 2012, a physical therapist noted that Petitioner reported "relief with modalities" and indicated he was "eager to return to work." PX 10.

Petitioner testified he was still experiencing headaches as of August 10, 2012 but his left elbow pain was "gone" and his left shoulder was "workable." T. 58.

Petitioner returned to Dr. Dubin on August 13, 2012, with the doctor noting, for the first time, that Petitioner complained of "persistent left shoulder/neck pain radiating down to his elbow." The doctor also noted complaints of headaches and back pain. The doctor instructed Petitioner to continue his medications. He released Petitioner to return to work as of August 20, 2012. PX 9.

Petitioner testified that Dr. Dubin prescribed additional therapy and that he underwent a second round of therapy at the doctor's office from August 16, 2012 through October 19, 2012. T. 59. Petitioner testified that this second round of therapy differed from the first round in that it involved more E-stimulation and massage. The "progress notes" concerning this therapy consist solely of pre-printed coded forms showing the date of each session, the body parts addressed during each session and Petitioner's response to therapy (i.e., "same, better, worse, no pain.") PX 9.

Petitioner testified he resumed his regular work duties and shift on August 20, 2012. Petitioner testified he "had to return to work," income-wise. He felt "okay" on August 20, 2012 and was able to complete his duties until 11:00 PM, when he pulled a garbage bag out and "reinjured" his shoulder. T. 62-63.

Petitioner returned to Dr. Dubin on August 30, 2012. The note of that date makes no mention of any work-related re-injury. It does contain the following notation, however: "pull

the muscle in his left shoulder." It also reflects that Petitioner complained of persistent headaches, constant neck stiffness, overall fatigue and depression. Dr. Dubin prescribed additional therapy, home rest and continued medication. PX 9.

At the next visit, on September 20, 2012, Dr. Dubin noted the same complaints and made the same recommendations. PX 9. Petitioner continued attending therapy thereafter through October 19, 2012. PX 9.

Petitioner returned to Dr. Dubin on October 22, 2012 and reported improvement. Dr. Dubin noted that Petitioner "did not [follow up] with ortho referral and did not complete MRI evaluation of the cervical spine." He indicated Petitioner was still experiencing headaches but was sleeping much better and experiencing much less neck pain. At Petitioner's request, the doctor administered a flu shot. He found Petitioner to be at MMI. He instructed Petitioner to "accelerate home exercise program and be careful at work." PX 9.

Petitioner testified he last saw Dr. Dubin about a month prior to the hearing. He continues to follow up with the doctor for his claimed work injuries. The doctor has changed his pain medication. [The last treatment note in evidence is the note summarized in the preceding paragraph.] He has missed time since returning to work. T. 66. His left elbow and shoulder feel good. His neck still hurts. He experiences "sharp" neck pain when he first gets up. He takes pain medication on rising. He continues to experience about three or four headaches per week. He takes both Norco and Excedrin PM for his current symptoms. T. 67-68.

Under cross-examination, Petitioner admitted that no witnesses were present when his claimed accident occurred. T. 70. He fell straight backward but "smashed" his left elbow and shoulder due to the configuration of the sink. He was unable to get up. He used his right hand to reach for his work radio. He was unconscious during at least part of his Emergency Room stay. T. 71. He left the hospital against medical advice, despite being unable to move his left arm, because he only felt "sore" after being given Morphine. He hates hospitals. Hospital personnel transported him to the exit via a wheelchair. Once he got out of the wheelchair, he walked on his own. A hospital guard gave him a ride to Respondent's parking lot, where he had left his car. He was sore but was able to drive home. He lives only four blocks from the school where he works. T. 71-72. He denied re-entering the school that night. He did not undergo the MRI that Dr. Dubin recommended because he felt better and did not want to lose more time from work. Although PX 2 reflects that he did not previously injure the body parts involved in the May 15, 2012 accident, he did in fact injure his left shoulder before that date. In 1988, he sustained a slight tear to his left rotator cuff. T. 77. He filed a workers' compensation claim in connection with this injury. He considers a rotator cuff tear an injury to the "armpit" rather than the shoulder. T. 78. Dr. Dubin is now his personal care physician. He sees the doctor for regular check-ups. He is scheduled to return to the doctor in the latter part of March 2013. He is currently working full duty. T. 79.

On redirect, Petitioner denied undergoing any treatment for his left shoulder between the time he recovered from the 1988 injury and May 15, 2012. He has received no benefits to date in connection with the instant claim. T. 80.

Ronald Anderson testified on behalf of Respondent. Anderson testified he began working for Respondent in October of 2007. He worked as a night foreman for three years and was then promoted to his current job as building and project manager. He oversees custodians and their supervisors. He also oversees construction projects. T. 83-84

Anderson testified he has known Petitioner since October of 2007. Petitioner worked on May 15, 2012. T. 85. On that date, Anderson met with Petitioner, gave Petitioner a letter and advised Petitioner of an upcoming meeting with human resources concerning an incident in which Petitioner supposedly failed to perform his job as instructed and used vulgar language when talking to a supervisor. Petitioner was "on his last warning" and was facing possible termination. T. 87. It was within fifteen minutes of Petitioner receiving the letter that Anderson received a call from Calvin Taylor indicating Petitioner was lying on the floor inside one of the janitor closets. T. 88. Anderson testified he went to this closet after Taylor called him. The closet was about 10 feet by 7 feet in size. When Anderson arrived, he saw a chair in the doorway. The cart was outside the closet. A bucket was on top of the cart. Anderson testified he used his Respondent-provided cell phone to take pictures of the closet and Petitioner after he arrived at the scene. Petitioner was lying on his right side and holding his left wrist. Petitioner said he had hit his head on the mop and sink. Petitioner indicated he injured his head, neck, back and left shoulder. The sink was about 3 feet away from Petitioner. Petitioner was conscious and talking in a normal fashion. Petitioner was not bleeding. Petitioner's pants were wet. T. 93-95.

Anderson testified that "they" called 911. He did not see Petitioner again that night after the paramedics took Petitioner away. At midnight, he received a call from Corey Johnson, one of Respondent's custodians. Johnson told him he had seen Petitioner re-entering the school building. T. 95.

Anderson testified that Petitioner took time off from work due to pain before May 15, 2012. Respondent employees are required to complete "absence request" forms when they take time off due to illnesses or vacation. Anderson sees these forms in the course of his duties. Anderson identified seven different forms Petitioner completed in connection with taking time off due to back pain. Four of these forms relate to eight days Petitioner took off in 2010. The remaining forms relate to six days Petitioner took off in February and April of 2012. T. 96-98. RX 1.

Under cross-examination, Anderson tendered his cell phone to Petitioner's counsel so that she could see the photographs he took of Petitioner and the closet on May 15, 2012. These photographs are not in evidence. T. 102.

Anderson testified he went up to the third floor before 7:00 PM on May 15, 2012. The letter he gave to Petitioner bore a date earlier than May 15, 2012 but he was unsure of the date. Anderson testified he received this letter from Ronald Pearson via electronic mail. Anderson printed the letter out so he could hand deliver it to Petitioner. He was not required to personally deliver the letter but it was his practice to personally deliver letters of this sort. T. 104. No one else was around when he gave the letter to Petitioner. At that point, Petitioner was on the "third step" in terms of disciplinary action. No Respondent employee is "100% terminated" until the board votes on this. To date, Respondent has never terminated Petitioner. T. 106.

Anderson testified he went back to the board room after he delivered the letter to Petitioner. T. 107. It was fifteen minutes after he delivered the letter that he received the call from Calvin Taylor alerting him to Petitioner's situation. Anderson testified Taylor was present when he arrived at the scene. Anderson called an ambulance because Petitioner was lying on the floor. He made no attempt to move Petitioner. Brandon Gale, who is head of security for Respondent, also arrived at the scene. T. 108.

Anderson testified he never printed out the photographs he took via his cell phone. He used his phone to show the photos to Arlene Salvado, Respondent's benefits coordinator. T. 109.

Anderson testified he left the school building at 10:00 PM on May 15, 2012. The building is locked after hours but the maintenance employees have 24-hour access. Corey Johnson, the night custodian, was at the building until midnight on May 15, 2012. T. 110-111.

Anderson testified that all of Petitioner's requests for time off were approved. T. 111.

On redirect, Anderson testified he saw video footage taken May 16, 2012. This footage showed a car pulling up in front of the school, Petitioner entering the school building and Petitioner exiting the building via the back door. T. 111-112.

Under re-cross, Anderson testified the footage showed Petitioner using the "north entry" to enter the school, walking down a hall from the north lobby, going through the cafeteria and exiting the back door. He reviewed the footage after Johnson contacted him. He last saw this footage in 2012. He is positive that the footage was taken post-accident. It is Gale who "pulled" the footage. He has no reason to doubt the history of Petitioner's accident. T. 112.

On rebuttal, Petitioner testified he experienced intermittent low back pain after a 1995 motor vehicle accident. Anderson handed him the letter about five minutes before the accident, while Petitioner was headed toward the closet after mopping the stairwell. Petitioner testified he did not really read the letter. He put the letter in his pocket. The letter subsequently got wet. T2, 8-9. At some point after the accident, Petitioner attended a disciplinary meeting but not with human resources. At the meeting, Petitioner saw

photographs that were dated May 14, 2012. After the meeting, Petitioner was suspended for five days. He "took" the suspension. T2, 12.

Calvin Taylor then testified on behalf of Respondent. Taylor testified he has worked for Respondent for eleven years. During the last seven years, he has worked as a night custodian at the academy where Petitioner also works. He typically works from 4:00 PM to midnight. He cleans sixteen classrooms per night and does whatever else he is asked to do. His assigned work area is the fourth floor. Petitioner is assigned to a larger area on the third floor. T2, 16-17.

Taylor testified that a board meeting was held at the academy at 7:00 PM on May 15, 2012. Both he and Petitioner worked that night. At some point, Petitioner called him via walkie-talkie and said, "can you come to the third floor?" Taylor arrived at the third floor within seven or eight minutes of receiving this call. When Taylor arrived, he saw Petitioner lying on his right side inside a custodian's "kitchen", or closet. T2, 18. This closet was the larger of two closets on the third floor. Petitioner was conscious but was not talking normally. Petitioner was talking "like a hurt person." T2, 25-26. Taylor had seen Petitioner earlier the same night, at which point Petitioner was "fine." Taylor asked Petitioner if he was okay. Petitioner told Taylor he slipped and fell. Taylor called security so that security could summon an ambulance. T2, 34-35.

Taylor testified that, when he arrived at the scene, the door of the closet was open and there was a red chair halfway inside the closet. The chair was "straddling" the threshold. T2, 31-33. A cart was inside the closet, about two or three feet away from Petitioner. A bucket was on top of the cart. There was a built-in "slop sink" inside the closet. Petitioner was seven to nine inches away from the sink. T2, 33-34.

Taylor testified he did not examine Petitioner. At some point, Petitioner changed positions so that he was lying on his back rather than his right side. T2, 26-27.

Taylor testified that, earlier the same night, he had seen Petitioner being handed a letter. Petitioner acted in a "business as usual" fashion after he received this letter. T2, 29.

Taylor testified that, after the paramedics took Petitioner away, he did not see Petitioner again that night. T2, 35.

Under cross-examination, Taylor testified he did not see Anderson give Petitioner the letter. The letter was "waiting for" Petitioner in the first floor receiving office. T2, 36.

Taylor testified that, although he is not assigned to the third floor, he was on the third floor at 3:00 PM on May 15, 2012 in order to talk to Ms. Mason. T2, 38.

Taylor testified that the chair he observed "straddling" the threshold of the closet is red, has four wheels and can be folded. When he found Petitioner, Petitioner was inches away from

the base of the sink. He did not take any photographs. When the paramedics arrived, they brought a gurney and a stretcher. They had to move the red chair out of the doorway. They also had to move the cart in order to gain access to Petitioner. T2, 41. Taylor clarified that, when he arrived at the closet, he stood in the doorway. He did not enter the closet because of "all the stuff" that was already inside the closet. He was two to three feet away from Petitioner. He could see Petitioner. Nothing obscured his vision. He called security and Brandon Gale, Respondent's security manager, came to the scene. Gale did not enter the closet. T2, 44.

Taylor testified he has not seen the video footage that Anderson and Petitioner referred to. He was not able to recall exactly when Petitioner returned to work. Ron Pearson and Corey Johnson still work for Respondent. T2, 45.

On redirect, Taylor testified that the cart was about four to six feet away from the sink. The closet is "not very big" and everything is "tight" inside it. T2, 46.

Under re-cross, Taylor testified that the photograph marked as PX 5 shows the red chair he saw. T2, 47.

Petitioner then recalled Anderson, who testified he went to the third floor on May 15, 2012 and personally handed the letter to Petitioner. Anderson testified that disciplinary letters are not left in employees' mailboxes. Only duty-related letters are left in those mailboxes. T2, 49. The surveillance footage he saw is still on Respondent's security cameras. Only the director of security has access to these cameras. Anderson testified he saw this footage twice on May 16, 2012. T2, 50-51. The footage was obtained late at night, sometime between May 15th and 16th. Respondent would have access to Pearson's, Johnson's and Gale's current addresses. T2, 56-57.

In response to questions posed by Respondent's counsel, Anderson identified RX 2 as the letter he discussed with Petitioner. He received this letter from Ronald Pearson prior to the accident. T2, 58-59. The photos he took with his cell phone did not show any chair, cart or bucket. He was not the person who transferred the surveillance footage from the security cameras to a disc. T2, 62-63.

On further rebuttal, Petitioner testified he rolled over after the accident because he was uncomfortable and needed to reach his phone, which had fallen off of a clip. He does not know whether the chair rolled when the accident occurred. T2, 64-65. At the meeting he attended after the accident, he saw photographs of himself walking in and out of the building. The date "May 14" appeared in the corner of the photographs. T2, 65. It was about 1:30 AM when he was released from the Emergency Room and went to Respondent's parking lot. He was unsure whether Gale came to the scene of the accident. Corey Johnson and another employee named "Ted" came to the scene. Both of these individuals still work for Respondent. T2, 67-68.

In addition to the exhibits previously summarized, Petitioner offered into evidence bills from his providers (PX Group 11) and his Petition for Penalties and Fees, filed on October 29, 2012 (PX 12).

Respondent offered into evidence the letter that Petitioner acknowledged receiving from Anderson. RX 2. The Arbitrator sustained Petitioner's foundational objection to the admission of this letter and marked the letter as a rejected exhibit. Respondent also offered its Response to Petitioner's Motion for Additional Compensation and Attorney's Fees, filed on November 13, 2012. RX 3.

Arbitrator's Credibility Assessment

The Arbitrator finds credible Petitioner's testimony concerning his duties and the configuration of the closet where he allegedly fell. Calvin Taylor confirmed that the closet contained a built-in sink as well as other moveable objects.

Petitioner was not credible as to various other issues, however. Petitioner did not rebut Anderson's testimony concerning his disciplinary status. Petitioner acknowledged that Anderson, one of Respondent's managers, handed him a letter five minutes before his claimed accident yet testified he put the letter in his pocket instead of really reading it. This testimony did not ring true. Petitioner testified he did not spill any water when he drained the bucket before he fell yet Emergency Room personnel indicated he "slipped on a wet floor." Petitioner testified he fell backward, with his head actually going inside the concrete sink. Emergency Room personnel noted "no ecchymoses to head." Petitioner testified he was unconscious during some of his Emergency Room stay but hospital personnel consistently described him as alert, oriented and speaking in full sentences. Petitioner's decision to exit the hospital against medical advice does not square with his dramatic account of falling in such a way as to land with his head inside a concrete sink. When Petitioner initially sought follow-up care, it was with his cardiologist, Dr. Bajgrowicz, and in part because he had a respiratory infection. Petitioner testified he asked Dr. Bajgrowicz's receptionist to complete an accident form for him because his dominant left arm was in a sling. There is no evidence that Petitioner was given a sling at the Emergency Room. After he left the Emergency Room, Petitioner was able to drive his car home from Respondent's lot. Dr. Bajgrowicz did not note any sling usage on May 17, 2012. Petitioner denied any back injury at the Emergency Room and did not voice back-related complaints to Dr. Bajgrowicz but reported having injured his back to Dr. Dubin.

Did Petitioner meet his burden of proving he sustained an accident on May 15, 2012 arising out of and in the course of his employment?

The Arbitrator finds that Petitioner failed to meet his burden of proof on the issue of accident. A variety of factors, and not simply the timing and unwitnessed nature of the accident, call Petitioner's credibility into question. Petitioner did undergo Emergency Room care very shortly after the claimed accident but it appears from the records that it was his

underlying cardiac condition and abnormal EKG, rather than his reported injuries, which quickly became the focus of attention.

The Arbitrator denies this claim based on her assessment of Petitioner as a witness and her review of the treatment records. The Arbitrator acknowledges that some of the testimony given by Respondent's witnesses (i.e., Anderson's statement that he has no reason to doubt Petitioner's history and Taylor's statement that Petitioner "sounded hurt") can be viewed as supportive of Petitioner's claim. The Arbitrator gives no consideration to Anderson's testimony concerning the photographs he took and the video he saw. Respondent did not seek to admit the photographs or video into evidence. Anderson's testimony as to these items played no role in the Arbitrator's thinking.

Having found that Petitioner lacked credibility and failed to prove a compensable accident, the Arbitrator views the remaining disputed issues as moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Samuel Gonzalez,
Petitioner,

vs.

NO: 12 WC 17551

14IWCC0149

Greenbrier Rail Services,
Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the decision of Arbitrator Cronin finding Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment on April 30, 2012. The Issues on Review are whether Petitioner sustained an accidental injury arising out of his employment on April 30, 2012, whether Respondent was given proper notice of said alleged accident, whether there is a casual connection between the alleged April 30, 2012 accident and Petitioner's present condition of ill-being, and if so, whether Petitioner is entitled to reasonable and necessary current medical expenses as well as prospective medical expenses. The Commission, after reviewing the entire record, reverses the Arbitrator's decision and finds Petitioner sustained an accidental injury arising out of and in the course of his employment on April 30, 2012. Petitioner provided proper notice to Respondent of said accident. Petitioner's current condition of ill-being is causally related to the April 30, 2012 accident. Petitioner is entitled to $7,072.82 in current medical expenses and Respondent is ordered to pay all reasonable and necessary medical expenses for the surgery recommended by Dr. Lorenz. Lastly, Petitioner was temporarily totally disabled from May 1, 2012 to January 22, 2012 for 38 weeks under Section 19(b) of the Illinois Workers' Compensation Act, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 38 year old machine operator, testified he lives in Gary, Indiana. He has worked for Respondent for six to seven years. His duties consist of recording numbers, loading machines and cutting metal on the wheels for freight cars. The wheels weigh between 28 tons to 125 tons, depending on the type. He takes the serial numbers down from the wheels. The wheels are on a

track. He pushes them into the machine. He has to make sure they are steady because if they aren't they will roll back on him.

2. On April 30, 2012, he worked the 2:00 p.m. to 10:00 p.m. shift. About ten minutes into his shift, he felt a pinch between his neck and his shoulder and pain that radiated down him arm and hurt his chest. He immediately stopped working and went to the front office. He spoke to Nate, the plant manager. Rick Benavidez and a couple of the secretaries were present in the office as well. He told Nate what happened. He told him he was loading the wheel set in the machine when he experienced a pinch in his neck and shoulder which radiated down his arm and his chest was in pain. Nate took him to the St. James Occupational Clinic. From there he was sent to the emergency room.

3. At the St James Emergency Room, Petitioner complained of right-sided trapezius and right shoulder pain that started while at work. He also complained of a tingling sensation that went down his right arm. An x-ray was taken and it showed a questionable non-displaced fracture through the superior glenoid and superior bony labrum. Petitioner was concerned about having a heart attack as there was a family history for the same. He underwent an EKG that was found to be negative. While the doctor's notes are partially illegible they indicate that Petitioner complained of right shoulder and neck pain after pulling and pushing. The nurse's notes indicated Petitioner reported right shoulder and back pain that radiated down the center of his chest at 1300 today. He also reported he took a 400 milligram Aleve at 1300 today. The final report indicated Petitioner reported chest pain and a pain in his right shoulder for three hours along with numbness in his right arm. There was no history of an accident given.

4. On May 1, 2012 Petitioner said he told the doctor at Occupational Health that his neck pain had gotten really severe and he still had numbness and pain in his shoulder. The doctor touched his shoulder and neck and wrote a prescription for muscle relaxers and pain killers. He also told him not to use his right arm. When he told Nate, Nate said you're off work now.

5. David Nesnidal testified he is the Maintenance and Environmental Health and Safety (EHS) coordinator for Respondent. His job is to perform safety training and complete accident reports along with inspecting the shop to see if anything needs to be repaired. Upon returning from the clinic on April 30, 2012, Petitioner said he had a fractured bone in his collar. Petitioner also reported that his shoulder started to hurt almost immediately after the shift began. Mr. Nesnidal identified PX1 as an incident report he wrote upon Petitioner's return from the clinic. He typed up what Petitioner related to him as to what had occurred. It is his wording but he asked Petitioner what had happened and that's how he wrote it up. He let Petitioner review the accident report after he typed it up. Petitioner didn't say they had to make any changes to the report. The report says employee complained of pain and numbness in right arm. There was" no specific event that occurred (or to be determined)". Mr. Nesnidal testified that the Petitioner didn't tell him specifically that he pushed the wheel set into the machine and that is what caused pain in his shoulder. He did type that Petitioner ''was at the wheel lathe, loaded set in machine" when he complained of pain and numbness in his right arm and shoulder. The April 30, 2012 Injury Report was introduced into the record and it paralleled Mr. Nesnidal's testimony.

6. On May 1, 2012 Petitioner followed up at the St. James Occupational Health Center. It was

noted that Petitioner had experienced sharp pain and numbness in his right arm, chest and back while at work. He was seen in the emergency room where he was treated for a possible right shoulder fracture. Currently, he is complaining of a pain in his neck and right shoulder along with tingling in the right upper extremity and a burning pain over his right shoulder. On physical examination, it was noted that there was a normal spinal alignment with spinous and right paraspinal tenderness. Petitioner demonstrated a full range of motion of his neck. His right shoulder was tender over trapezius and anterior aspect. His range of motion was not checked as his arm was in a sling. An x-ray of his right shoulder showed a questionable non- displaced fracture through the superior glenoid and superior bony labrum. Petitioner was diagnosed with a cervical strain and a questionable right shoulder strain. He was instructed not to work with his right hand, to wear the arm sling when he worked, to take his medication and to undergo a right shoulder MRI.

7. On May 18, 2012 Petitioner was seen by Dr. Rhode at Orland Park Orthopedics. Dr. Rhode noted that Petitioner presented for consultation of neck and shoulder pain secondary to injury while at work "sustained April 30, 2000 fall". Petitioner reported he was working as a machine operator and was loading material into a machine when he felt a sudden pinching sensation along the posterior medial aspect of his right shoulder. He states that this single event caused a sharp pain from his neck all the way down the arm to the thumb and index finger. He was initially evaluated by an emergency room doctor who thought Petitioner was experiencing a heart attack. An EKG was performed and it was negative. Attention was subsequently directed toward the shoulder for which he was told he had a possible fracture. The Petitioner has continued to experience right-sided neck pain with radiation to the thumb and long finger. On physical examination, there is pain elicited over the cervical area bilaterally and the cervical paraspinous muscle. He demonstrated limited active range of motion of the neck with left lateral flexion to 35 degrees and right lateral flexion to 15 degrees along with a positive right Spurling test. His shoulder x-ray showed no evidence of glenohumeral changes with a centrally located humeral head. There is no evidence of an anterolateral sub-acromial spur and no greater tuberosity escrecence. The AC joint was without any degenerative changes or osteolysis. Dr. Rhode diagnosed Petitioner has having neck and shoulder pain along with cervical radiculopathy. He treated Petitioner with medication, a Medrol Dosepack, ordered a cervical MRI and told Petitioner to stay off of work. Dr. Rhode opined that the patient sustained a single event work-related injury secondary to loading a machine.

8. On May 21, 2012 Petitioner filed an Application for Adjustment of Claim with the Commission which states that he injured his right dominant shoulder at work while performing work activities. At the commencement of the January 22, 2012 Arbitration hearing, Petitioner amended his Application for Adjustment of Claim to include his cervical area as well.

9. The May 23, 2012 cervical MRI indicated Petitioner has a right-sided disc herniation at C6-7 into the ventral epidural space with moderate central canal compromise and mild cord compression off midline to the right and accompanying the right foraminal compromise. There was also uncinate spurs at C3-4 that mildly narrow the right neural foramina.

10. In a May 25, 2012 follow-up visit, Dr. Rhode instructed Petitioner to continue to stay off of work and he referred Petitioner to Dr. Lorenz. Petitioner was seen by Dr. Lorenz on August 30,

2012.

11. Dr. Lorenz noted Petitioner, a machine operator, was at work on April 30, 2012 and was pushing equipment when he felt a sharp pinch in his neck and he began feeling numbness down his right arm. He was also pulling an object with his right hand. Petitioner was initially sent to the emergency room and was then referred for evaluation of shoulder. The shoulder was worked up and a right shoulder MRI was obtained. On physical examination the Petitioner's range of motion in his neck is diminished to extension, which reproduces arm pain. He has a positive Spurling's maneuver to the right that radiates pain down his arm. He has profound weak triceps. He is right-handed. The cervical MRI shows a right-sided disc herniation which compresses the cord and compromises the right foramen at C6-C7. Dr. Lorenz diagnosed Petitioner with severe radiculopathy on the right side secondary to a right-sided disc herniation. Dr. Lorenz opined that the disc herniation was caused by the pulling the patient reported while at work. Petitioner said he has had no conservative treatment so we are going to treat this conservatively. He was placed him on Medrol Dosepak along with cervical traction and physical therapy. He was instructed to remain off work and recheck with the office in one week.

12. On September 6, 2012 Petitioner followed-up with Dr. Lorenz who noted Petitioner has had a trial of conservative care with follow up after the Medrol Dosepak. This had no effect on him at all. Due to the patient's profound weakness at this point and failing to respond to conservative care, his recommendation is for Petitioner to undergo an ACDF C6-C7 procedure on the right side. He noted Petitioner was to remain off work. He opined that the injury was "caused by the patient's attempt to close the doors which were quite heavy".

13. Ricardo Benavidez, Jr., testified he is the general foreman for Respondent. His duties include plant production and supervising the employees in the shop. He is familiar with Petitioner's job duties as he ran the same machine when he worked in the shop. The wheel sets are loaded into the machine by manually rolling them into the machine. The wheels are on rails and they roll pretty easily. It takes 15-16 pounds of pressure to get a wheel to start rolling. We measured it to see what it would take. Once the wheel starts rolling, it rolls pretty easily on the rail. He would consider this job to be at a medium physical level. He became aware of the fact that Petitioner had a pending workers' compensation claim about a week after the alleged incident. He was told about the same by Nathan, the plant manager. The Petitioner never told him he hurt his arm or neck while pushing a wheel set on April 30th. On cross-examination, Mr. Benavidez agreed that if a wheel need repair it doesn't run as smoothly as other wheels and that is why the wheel is going into the machine so that it can get ground down and smooth out. He agreed that it is possible that the wheels that have more warping would be harder to push.

14. Nathan Harbeck testified he is the plant manager for Respondent. He is responsible for the production of the shop, all of the inventory as well as taking an employee head count and insuring the employees' safety and well-being. Mr. Harbeck testified that it takes less than 20 pounds of pressure to start the movement on the wheel set. He noted that Petitioner hadn't worked the prior Friday leading up to the alleged April 30, 2012 accident. Petitioner has called in sick on that Friday. The Petitioner didn't work Saturday or Sunday either. He started working on Monday at 2:00 p.m. Approximately 20 minutes into his shift, the Petitioner came to the front office and complained of pain and numbness in his right arm and asked for someone to take him

to the doctor. Mr. Harbeck testified that he grabbed his keys and took the Petitioner to the doctor in his own car. The Petitioner said he was afraid the pain had something to do with his heart since he had heart issues in his family. The Petitioner didn't tell him he had pain and numbness caused by pushing a wheel set into the machine. He didn't say he had pain in his neck. After the Petitioner was diagnosed he said he had been told that he fractured his shoulder. The next day Petitioner came to the shop and his arm was in a sling. When he asked the Petitioner what happened the Petitioner told him he didn't know how he injured himself. He said it didn't happen at work and that's why we started filling in the short-term disability paperwork. He didn't become aware of Petitioner alleging that he hurt himself while performing his job duties until he received a letter from Petitioner's lawyer. He said that the Petitioner is always tight on money and he figured the Petitioner might have been looking for some kind of payout. Mr. Harbeck said he was aware of the fact that David Nesnidal had filled out an incident report. He testified that the company doesn't have a reward program for the plant manager or safety coordinator when there are less claims filed in a given year. The only incentive given is for the employees on the shop floor. He had not worked on that particular machine in question but he has rolled thousands of wheel sets in his time. He agreed that some wheel sets are more out of round than others. The 20 pound pressure to get a wheel set moving is a very close estimate for all of the wheel sets.

15. Petitioner was called as a rebuttal witness. Petitioner said he told Mr. Harbeck after the emergency room visit that the doctor said it was a possible fracture and that he has told the hospital that it happened at work. He denied telling him that he didn't get hurt at work. He told the hospital on April 30th that he felt pain in his shoulder and right arm while at work loading a machine. He also told this history to Drs. Rhode and Lorenz. He told Mr. Nesnidal after coming back from the emergency room and he told then in the Occupational medical department that on April 30th he experienced pain and numbness in his right arm while he was at the lathe. Petitioner said he injured his neck, right shoulder and right arm on Monday, April 30, 2012. He worked that Friday. He can't say he trusts what the emergency room personnel put down because he still had pain in his neck. He is certain that he told the emergency room personnel that he was rolling the wheel set when he felt the pain. He lives in Gary, Indiana and he saw Dr. Rhodes in Orland Park, Illinois. He agreed that it was a little bit of a drive. His fiancée drove him there. He was referred to Dr. Rhodes by Jamie Trapp, an attorney he first contacted. Mr. Trapp referred him to another attorney. He didn't meet Mr. Blum, his attorney until the first time they were there for court. He had a chance to review the Application for Adjustment of Claim before he signed it. He believes the Application for Adjustment of Claim was completed probably by Dr. Rhode. He filled it out in Dr. Rhode's office. Then Dr. Rhode's office sent it over to Mr. Blum to sign it. It listed injuries to right dominant shoulder at work while performing work activities. He didn't list neck until after Dr. Rhode's initially saw him and he ordered an MRI. This is the case even though he told him at the time how the accident occurred. He was able to review the incident report. He believes the report as typed up accurately reflected what he told Nate. If it wasn't accurate at the time, he would have asked him to change it. He is aware of the fact that it says employee complains of pain, numbness in the right arm, no specific event or to be determined. He doesn't know the meaning of specific event.

14IWCC0149

The Commission has reviewed all of the evidence and finds that based on the evidence Petitioner has sustained an accidental injury arising out of and in the course of his employment on April 30, 2012. While there were instances where no history of or slight inconsistencies were given regarding the accident, Petitioner's testimony and the majority of the histories given to his treating doctors indicate Petitioner was at work performing his job duties at the time of the accident. Petitioner initially reported to occupational health and the emergency room on the day of the accident with what he believed to be a heart attack. The initial work-up at the emergency room was for the purported heart attack and only after an EKG was performed and the heart attack was ruled out was the focus shifted to Petitioner's right shoulder. Although Petitioner reported neck, chest and back pain, Petitioner was only told that he probably had a questionable fracture of his right arm. Upon returning to the plant Mr. Nesnidal completed an injury report based on Petitioner's report of event. While it was noted that no specific event occurred, it was also noted that Petitioner was at the wheel lathe and was loading set into the machine. As such the Commission finds that Respondent was provided with proper notice of the accident. When Petitioner was asked what a specific event was he testified that he didn't know. When Petitioner was sees at occupational health the day after the accident he reported experiencing pain and numbness in his right arm, chest and back while at work and he also reported experiencing current complaints of neck and right shoulder pain. He was diagnosed with both cervical and right shoulder strains. As such the Commission finds that there is sufficient evidence to find that Petitioner sustained an accidental injury arising out of and in the course of his employment on April 30, 2012 that resulted in injuries to his right arm/shoulder as well as his neck. The Commission further finds that there is sufficient evidence to show that Petitioner's current condition of ill-being is causally related to the April 30, 2012 accident. Moreover, the Commission finds based on Petitioner's PX2-4 that Petitioner is entitled to $7,072.82 in current medical expenses and based on Dr. Lorenz's records that Respondent is ordered to pay all reasonable and necessary medical expenses for the surgery recommended by Dr. Lorenz. Lastly, the Commission finds Petitioner was temporarily totally disabled from May 1, 2012 to January 22, 2012 for 38 weeks under Section 19(b) of the Illinois Workers' Compensation Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $532.53 per week for a period of 38 weeks, that being the period of temporary total incapacity for work under Section 8(b), and that as provided in Section 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $7,072.82 for current medical expenses and Respondent is ordered to pay all reasonable and necessary medical expenses for the surgery recommended by Dr. Lorenz under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

14IWCC0149

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a Notice of Intent to File for Review in Circuit Court has expired without the filing of such or after the time of completion of any judicial proceedings, if such a notice has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

MB/jm

O: 1/16/14

43

David L. Gore

Michael J. Brennan

DISSENT

I would respectively dissent from the decision of the majority of the Commission based on the reasons set forth below. I would affirm the Arbitrator's finding that Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment on April 30, 2012. Contrary to Petitioner, Nathan Harbeck testified that Petitioner called in sick and did not work on the Friday, Saturday or Sunday before the alleged accident. Petitioner was only at work for 10 minutes prior to claiming he sustained an accident. At that time Petitioner believed he was having a heart attack with right shoulder pain. He reported the same to Nathan Harbeck who immediately drove him to the occupational health center. The clinic then sent him to the emergency room to rule out a heart attack. While at the emergency room, Petitioner reported he had taken an Aleve prior to starting work and he did not report a history of a work accident. Upon arrived back at the plant Petitioner completed an injury report where he again related that there was no specific event that occurred at the time. Petitioner returned to the occupational health department the following day and again he did not report that he sustained a work related accident. Mr. Harbeck testified that Petitioner told him the injury did not happen at work and as such he provided Petitioner with short term disability forms. Petitioner had four separate opportunities to tell others that he had a work related accident. Yet, Petitioner provided no such indication that he sustained a work related history. On May 16, 2012 Petitioner signed an Application for Adjustment of Claim stating he injured his right shoulder at work while performing work activities. According to Petitioner the Application was completed by Dr. Rhodes who was referred to Petitioner by an attorney. Only at that time was there an indication that Petitioner was relating the same to work and he provided a specific history of a work accident. The Arbitrator, having seen all of the witnesses, was in the best position to assess the credibility of the witnesses. Based on Petitioner's calling in sick and taking medication prior to the alleged accident, his failure to report a work accident to his employers on several

occasions, the lack of a history that Petitioner sustained a work accident in the contemporary medical records and the fact that the medical histories did not parallel Petitioner's testimony at trial until after he conversed with an attorney and went to the doctor recommended by the attorney, I would find that Petitioner failed to prove he sustained a work related accident on April 30, 2012.

Mario Basurto

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edward Kozlowski, Jr.,

Petitioner,

vs.

NO: 12 WC 20332

14IWCC0150

Town of Cicero,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of extent of temporary total disability, whether Petitioner resigned his employment with Respondent, the motion for additional evidence and the motion to strike the statement of exceptions and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the exhibits be stricken from Respondent's statement of exceptions, and that any references to them are disregarded. All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 4, 2013 is hereby affirmed and adopted.

14IWCC0150

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No is bond required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 7 2014

MB/mam
O:2/6/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

KOZLOWSKI JR, EDWARD
Employee/Petitioner

Case# **12WC020332**

14IWCC0150

TOWN OF CICERO
Employer/Respondent

On 6/4/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

DAVID F SZCZECIN & ASSOC LTD
205 W RANDOLPH ST
SUITE 1801
CHICAGO, IL 60606

4217 DEL GALDO LAW GROUP LLP
GEORGE S SPATARO
1441 S HARLEM AVE
BERWYN, IL 60402

14IWCC0150

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Edward Kozlowski, Jr.
Employee/Petitioner

v.

Town of Cicero
Employer/Respondent

Case # 12 WC 020332

Consolidated cases: None

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **November 14, 2012 and November 19, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other ___

14IWCC0150

FINDINGS

On the date of accident, **5/29/2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$36,400.00**; the average weekly wage was **$700.00**.

On the date of accident, Petitioner was **34** years of age, *single* with **0** dependent children.

Respondent *has* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$4,969.38** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$4,969.38**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$466.67**/week for **23-1/7** weeks, commencing **5/30/2012** through **11/7/2012**, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 31, 2013
Date

ICArbDec19(b)

JUN - 4 2013

Findings of Fact

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

E. WAS TIMELY NOTICE OF ACCIDENT GIVEN TO RESPONDENT?

Respondent's disputes that Petitioner had a compensable accident on May 29, 2012 and that he failed to give timely notice of the accident to Respondent are without merit. Petitioner, while pursuing an offender, and jumping over a fence, pushed off with his right arm and immediately felt pain in the right shoulder.

Petitioner's Exhibit #1, which is entitled "EMPLOYEE'S REPORT OF INCIDENT" is signed by Petitioner and Sergeant Gilpin on May 29, 2012. The bottom section of the report, which is to be completed and signed to be signed by his supervisor, states: "If you have any doubts or variations with what was reported to you by the injured employee, please describe in detail. (Use additional paper if needed.)"

Sgt. Gilpin left blank the space at the bottom of the form. Sgt Gilpin signed the form.

By leaving the space blank, the Arbitrator draws the reasonable inference that Sergeant Gilpin had no doubts or variations with Petitioner's report.

Lieutenant Hatton and Deputy Commander Gonzalez both testified on behalf of the Respondent. On cross-examination, they admitted that they were aware that Petitioner sustained an accidental injury on May 29, 2012.

Therefore, the Arbitrator finds that on May 29, 2012, Petitioner sustained an accident that arose out of and in the course of his employment by Respondent. The Arbitrator further finds that Petitioner gave timely notice of said accident to Respondent.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Petitioner testified that following the accident of May 29, 2012, he was transported to Oak Park Hospital, which is located near Madison Street and Harlem Avenue. He underwent a physical examination. X-rays of his right arm were taken. The hospital provided a sling and an ice pack, advised him to follow up with an orthopedic surgeon, and discharged him.

Petitioner testified that he returned to the Cicero Police Department that same day. Lieutenant Cruz instructed Petitioner to fill out the "EMPLOYEE'S REPORT OF INCIDENT", conducted a urine and breath analysis and advised Petitioner to obtain Dr. Khanna's next available appointment.

Petitioner testified that on May 31, 2012, he came under the care of Dr. Khanna of Advanced Occupational Medicine Specialists ("AOMS") for a right shoulder injury. (Petitioner's Group Exhibit #4)

Petitioner submitted its record into evidence and it reflects, *inter alia*, that on May 31, 2012, he was diagnosed with a possible right glenoid labral v. rotator cuff tear. Petitioner underwent an MRI on June 1, 2012. Radiologist Choe offered the following impression of the MR images: (1) Tendinosis of the supraspinatus tendon and mild subacromial/subdeltoid bursitis, and (2) Findings suggesting a tear of the glenoid labrum with

possible associated small paralabral cyst. Dr. Khanna or Dr. Stewart of AOMS then referred Petitioner to Dr. Tu, an orthopedist at G & T Orthopaedics and Sports Medicine. (Petitioner's Group Exhibit #4)

Petitioner testified that both Dr. Khanna and Dr. Tu prescribed right shoulder surgery. Petitioner further testified that he did not undergo the surgery at the time it was prescribed.

Petitioner testified that between May 29, 2012 and November 6, 2012, he experienced constant pain in his right shoulder. He had a restricted range of motion of the right arm and could not lift beyond a certain point. He also noticed that he had no strength in his right hand.

Petitioner testified that he underwent surgery on his right shoulder on November 7, 2012.

Respondent's Counsel stated at hearing, on the record, that Petitioner had undergone rotator cuff repair on November 7, 2012, and that Respondent was going to resume payment of TTD as of November 8, 2012, and make payment of the medical incurred in connection with the surgery.

Medical testimony is not essential to support the conclusion that an accident caused a claimant's condition of ill-being. University of Illinois v. Indus. Comm'n, 365 Ill. App.3d 906, 912, 851 N.E.2d 72, 78, 303 Ill. Dec. 174 (2006).

A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury. International Harvester v. Indus. Comm'n, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982).

Based on the foregoing, the Arbitrator concludes that Petitioner's current condition of ill-being of his right shoulder is causally related to the accident of May 29, 2012.

G. WHAT WERE PETITIONER'S EARNINGS?

In Arbitrator's Exhibit #1, Respondent agreed with Petitioner's claim that his "earnings during the year preceding the injury were $36,400.00, and the average weekly wage, calculated pursuant to Section 10 of the Act, was $700.00."

Yet, Respondent's Counsel kept this stipulation in place while he proceeded to cross-examine Petitioner on Respondent's Exhibits #7 and #8. Respondent's Exhibit #7 is the "EMPLOYEE EARNINGS HISTORY" for the period of January 6, 2012 through June 8, 2012. Respondent's Exhibit #8 is the "PAID INVOICE REPORT" which shows that Respondent issues six "WORKMEN'S COMP" checks. The amount of each check was $828.23 and the check dates were 6/20/12, 7/04/12, 7/18/12, 8/01/12, 8/15/12 and 8/29/12. The checks totaled $4,969.38.

Petitioner testified that he was a part-time officer with the Cicero Police Department and that he worked four days a week. He testified that on May 29, 2012, he worked from 3:00 p.m. to 11:00 p.m.

On cross-examination, Petitioner testified that he normally worked 32 hour weeks. Petitioner further testified that he *could* work a 40 hour week, but as a part-time policeman, he could not exceed a certain number of hours in one year.

Lieutenant Hatton testified that part-time police officers for Respondent could work a maximum of 1560 hours per year.

Deputy Commander Gonzalez testified that for a part-time police office, work is not available at Respondent if he has already worked 1560 hours that year.

The Arbitrator notes that Section 10 of the Worker's Compensation Act provides as follows:

> The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of the 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted . . .

Petitioner testified that he has worked for Respondent for approximately 13 years. There is no evidence of Petitioner's earnings for the full 52 week period immediately preceding his accidental injury. There is no evidence of Petitioner's hourly wage in 2011.

Moreover, Respondent never withdrew their stipulation. The stipulation stands.

The language of Ill. Admin. Code tit. 50, §7030.40 indicates that the request for hearing is binding on the parties as to the claims made therein. Walker v. Indus. Comm'n, 345 Ill. App. 3d 1084, 804 N.E.2d 135 (4th Dist. 2004)

Therefore, the Arbitrator finds Petitioner's earnings in the year preceding the accident to be $36,400.00 and his average weekly wage to be $700.00.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE? TTD

The issue in this 19(b) hearing is non-payment of TTD for the period of August 14, 2012 through November 7, 2012.

Respondent paid TTD benefits from May 30, 2012 through August 13, 2012, at which time payment was terminated without explanation. Such action was not in accordance with Section 7110.70(b) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission.

A review of Petitioner's Group Exhibit #4 reveals that at no time was Petitioner able to return to his regular occupation as a police officer. He never reached maximum medical improvement, per the reporting. As a matter of fact, he was in need of, and was being scheduled for, surgery.

Petitioner testified on cross-examination that following his visit to AOMS on May 31, 2012, he returned to the police station and reported to Lt. Hatton and Deputy Commander Gomez. Petitioner told these gentlemen that he had seen a doctor for his shoulder. They told him that there was no light-duty work.

Both officers appeared for Respondent and denied that such conversation took place.

The Arbitrator finds that both of Respondent's witnesses were lacking in credibility.

The Arbitrator finds that Respondent never offered light-duty work to Petitioner.

Respondent's defense for terminating TTD benefits when they did is that Petitioner resigned his employment after charges were brought for his termination. The Petitioner testified that the charges were for matters that occurred prior to May 29, 2012.

Respondent argues that Petitioner resigned his employment and that they terminated TTD benefits on the basis that he took himself out of the labor market, he was on his own and he should look for work.

Petitioner denies that he resigned his employment. Any agreement as to resignation was never signed by the Respondent or the Petitioner. There is no basis for the termination of TTD for the period in question.

> "Whether an employee has been discharged for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases. An injured employee's entitlement to TTD benefits is a completely separate issue and may not be conditioned on the propriety of the discharge . . . the determinative inquiry for deciding entitlement to TTD benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to TTD benefits." Interstate Scaffolding v. Illinois Workers' Comp. Comm'n, 236 Ill. 2d 132, 149, 923 N.E.266 (2010).

Based on the foregoing, the Arbitrator finds that Petitioner is entitled to TTD benefits for the period of May 30, 2012 through November 7, 2012. Respondent is entitled to a credit for amounts previously paid.

The Arbitrator notes that Respondent's Counsel at the hearing, on the record, stated and represented that Respondent will be paying Petitioner TTD benefits commencing November 8, 2012 and continuing since he underwent surgery on November 7, 2012 and that the Respondent will be paying the medical in connection with the surgery.

M. SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT?

It is true that Respondent's disputes that Petitioner had a compensable accident on May 29, 2012 and that he failed to give timely notice of the accident to Respondent are without merit.

Yet, Respondent argues that Petitioner never presented himself for light-duty work, which Respondent had available. Respondent paid $4,969.38 in TTD benefits. Moreover, Respondent's Counsel has represented that they will restart TTD benefits after the November 7, 2012 right shoulder surgery and will pick up the medical in connection with the surgery.

Based on the foregoing, the Arbitrator finds that penalties and attorneys' fees are not warranted in this case.

O. MOTION TO STRIKE UNFILED SECTION 19(b)/MOTION TO STRIKE INCOMPLETE 19(b) PETITION

Before he commenced hearing the case on November 14, 2012, the Arbitrator denied Respondent's motions.

It is true that Petitioner did not file-stamp the 19(b) Petition. Yet, proof of service indicates that Petitioner's Counsel affirmed that he mailed, with proper postage, a copy of this Petition, at 5:00 p.m. on 9-19-12. (Respondent's Exhibit #1)

It is also true and that there are some blank spaces in such Petition. (Respondent's Exhibit #1)

In a letter dated September 20, 2012, Respondent's Counsel responded to the Petition. (Respondent's Exhibit #2) Among other things, Respondent's Counsel requested a copy of the Application for Adjustment of Claim.

The Commission file indicates that Petitioner filed the Application for Adjustment of Claim on June 12, 2012, and that on June 14, 2012, the Commission sent notice to "Town of Cicero, 4949 W. Cermak Rd., Cicero, IL 60804."

The Arbitrator's records indicate that he set this matter for pre-trial on October 24, 2012. On that date, he held a pre-trial with Petitioner's Counsel and Respondent's Counsel. At that time, there was a discussion with regard to the issues in dispute.

Thereafter, arbitration hearings were held on November 14, 2012 and November 19, 2012.

Section 7020.80(a)2 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission states:

> "The Arbitrator to whom the case is assigned shall attempt to resolve the matter informally. If the matter cannot be resolved at that time, and the Arbitrator determines Petitioner is not receiving temporary total disability or medical benefits, said Arbitrator shall order the case to formal hearing on a date certain as soon as possible."